TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~483.~~ 257

GEORGE N. BLACK, PLAINTIFF IN ERROR,

vs.

DAVID R. CURRAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 9, 1870.

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1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Thomas Drummond, judge of the seventh judicial circuit, and the Hon. Samuel H. Treat, district judge of the said southern district of Illinois, on Friday, the twenty-fourth day of June, at the June term of said court, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth year.

J. A. JONES, *Clerk.*

DAVID R. CURRAN
v.
GEORGE N. BLACK. } In ejectment.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

David R. Curran, plaintiff, a citizen of the State of Wisconsin, puts in his place Messrs. McClernand, Broadwell and Springer and Jackson Grimshaw, esq., his attorneys, against George N. Black, defendant,
2 a citizen and resident of the said southern district of Illinois, who puts in his place Messrs. Herndon and Zane and Stuart, Edwards and Brown, in a plea of trespass and ejectment.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the second day of July, in the year of our Lord one thousand eight hundred and sixty-six, in open court, came said plaintiff by his said attorneys, and filed in the clerk's office of said court his declaration in ejectment against the said defendant, together with a notice in writing thereto attached, and also an affidavit of a due service of a true copy of said declaration and notice upon the defendant, and also at the same time filed his bond for costs in said entitled cause; which said declaration, notice, affidavit, and bond for costs are in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for the southern district
3 of Illinois, to the June term, A. D. 1866.

[50-ct. U. S. int. rev. stamp, canceled, 50-ct.]

David R. Curran, the plaintiff in this suit, who is a citizen of the State of Wisconsin, one of the United States of America, by Jackson Grimshaw, his attorney, complains of George N. Black, the defendant, who is a citizen of the State of Illinois, one of the United States of America, of a plea:

Wherefore he, the said defendant, with force and arms, &c., entered into the following-described premises: For that heretofore, to wit, on the 29th day of June, 1866, the said plaintiff was possessed of certain premises situated in the county of Sangamon, in the State of Illinois, and described as follows, to wit: The west half of lot five, (5,) in block one, (1,) in E. Roberts' addition to the town, now city, of Springfield, in Sangamon County and State of Illinois; and, being so possessed thereof, the said defendant afterwards, to wit, on the day and year aforesaid, &c., entered into such premises, and that he unlawfully withholds from said plaintiff the possession thereof. And the said plaintiff avers that he

claims title to said premises in fee. Wherefore said plaintiff says
4 that he is injured and has sustained damages to a large amount, to wit, five hundred dollars, and that said property is of the value of five hundred dollars, ($500;) and therefore he brings suit, &c.

And also for that heretofore, on the 29th day of June, 1866, &c., the said plaintiff was possessed of certain other premises situated in the county of Sangamon aforesaid, in said State of Illinois, and described as follows, to wit: The west half of lot five, (5,) in block one, (1,) in E. Roberts' addition to the town, now city, of Springfield; and, being so possessed thereof, the said defendant afterwards, to wit, on the day and year aforesaid, &c., entered into such possession, and that he unlawfully withholds from the said plaintiff the possession thereof. And the said plaintiff avers that he claims title to said premises in fee. Wherefore said plaintiff says that he is injured and has sustained damages to a large amount, to wit, five hundred dollars, and that said property is of the value of five hundred dollars, ($500;) and therefore he brings suit, &c.

McCLERNAND, BROADWELL & SPRINGER,
J. GRIMSHAW, *Att'ys for Pl'ff.*

5 (Indorsed:) Filed July 2nd, 1866.

P. P. ENOS, *Clerk.*

To the defendant in this suit:

Take notice—

1st. That during the present June term of the United States circuit court of the southern district of Illinois, within and for said district, to wit, at the court-house in Springfield, in said southern district and State, on the 30th day of June, A. D, 1866, or as soon thereafter as counsel can be heard, a declaration, of which the foregoing is a copy, will be filed in said circuit court.

2nd. That upon filing the same a rule will be entered requiring you, such defendant, to appear and plead to such declaration within twenty days of such rule.

3rd. That if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises described in said declaration.

Dated at Springfield this 30th day of June, A. D. 1866.

6 McCLERNAND, BROADWELL & SPRINGER,
J. GRIMSHAW, *Att'ys for Pl'ff.*

(Indorsed:) Filed July 2nd, 1866.

P. P. ENOS, *Clerk.*

STATE OF ILLINOIS, *Sangamon County:*

Thomas G. Prickett, being duly sworn, upon his oath says that he served a declaration and notice, of which the within and foregoing are copies, upon George N. Black, the above-named defendant, by delivering the same to him personally on this 30th day of June, A. D. 1866.

THOMAS G. PRICKETT.

Subscribed and sworn to before me this 30th day of June, A. D. 1866.

P. P. ENOS, *Clerk.*

(Indorsed:) Filed July 2nd, 1866.

P. P. ENOS, *Clerk.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

Circuit court, June term, A. D. 1866.

7 DAVID R. CURRAN } In ejectment.
vs.
GEORGE N. BLACK. }

I do hereby enter myself security for costs in this cause, and acknowledge that I am bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this 29th day of June, 1866.

JACKSON GRIMSHAW.

(Indorsed:) Filed July 2nd, 1866.

P. P. ENOS, *Clerk.*

Whereupon, on the same day of the month, in the term and year aforesaid, the following proceedings were had in said court in said entitled cause, and entered of record, to wit:

DAVID R. CURRAN } In ejectment.
vs.
GEORGE N. BLACK. }

8 Now comes the plaintiff by Messrs. McClernand, Broadwell and Springer, his attorneys, and files his declaration in ejectment against the defendant, together with a notice in writing thereto attached, and also an affidavit of a due service of a true copy of said declaration and notice upon the defendant; and upon reading and filing the same, it is ordered by the court, on motion of the plaintiff, by his attorneys, that the cause be docketed, and the defendant be ruled to plead thereto within twenty days, or that his default be entered. It is further ordered that this cause be continued.

And afterwards, to wit, on said second day of July, in the term and year aforesaid, came said defendant by his said attorneys, and filed in said clerk's office his plea herein in the words and figures following, to wit:

Circuit ct. U. S. A., district Ill's.

GEO. N. BLACK } Plea, not guilty.
ats.
D. R. CURRAN. }

9 And the said defendant comes & defends the wrong & injury when, where, &c., and says actio non, because, he says, he is not guilty of unlawfully withholding from the plaintiff the possession of the lands claimed in the said plaintiff's declaration in manner & form. And of this the said defendant puts himself on the country. Wherefore, &c.

HERNDON & ZANE,
For Black.

And the plaintiff doth the like.

McCLERNAND, BROADWELL & SPRINGER,
For themselves and for J. Grimshaw, Att'ys for Pl'ff.

(Indorsed:) Filed July 2d, 1866.

P. P. ENOS, *Clerk.*

Afterwards, to wit, on the first day of February, at the January term of said court, in the year of our Lord one thousand eight hundred and sixty-seven, the following further proceedings were had in said court in said entitled cause, and entered of record, to wit:

10 DAVID R. CURRAN *vs.* GEORGE N. BLACK. } In ejectment.

Now comes the plaintiff by Messrs. Grimshaw and McClernand, his attorneys, and also the defendant by Messrs. Herndon and Zane, his attorneys; and, issue being joined, by agreement they waive the intervention of a jury, and for trial put themselves upon the court; and the court, having heard the evidence and the arguments of counsel, not being sufficiently advised in the premises, takes time to consider.

Then, afterwards, to wit, on the seventeenth day of June, at the June term of said court, in the year last aforesaid, the following further proceedings were had in said court in said entitled cause, and entered of record, to wit:

DAVID R. CURRAN *v.* GEORGE N. BLACK. } In ejectment.

11 By agreement of the parties, by their respective attorneys, this cause having been heretofore heard by the court, and taken under advisement, it is ordered by the court that this cause be continued.

And afterwards, to wit, on the eleventh day of February, at the January term of said court, in the year of our Lord one thousand eight hundred and sixty-eight, the following further proceedings were had in said court in said entitled cause, and entered of record, to wit:

DAVID R. CURRAN *v.* GEORGE N. BLACK. } In ejectment.

Now come again the parties by their respective attorneys, and the court, having fully considered and being now sufficiently advised in the premises, finds the defendant guilty of unlawfully withholding from the plaintiff possession of the real estate and premises described in the plaintiff's declaration, to wit: "The west half of lot five, (5,) in block one, (1,) in E. Roberts' addition to the town, now city, of Springfield, in
12 Sangamon County, and State of Illinois." The court also finds the estate established in the plaintiff upon the trial to be an estate in fee-simple.

It is, therefore, considered and adjudged by the court that the plaintiff have and recover of and from the said defendant possession of the said described real estate and premises, according to the force, form, and effect of his said recovery; and that he have a writ of possession therefor; and that he also have and recover of and from said defendant his

costs by him about his suit in this behalf expended, amounting to the sum of twenty-five dollars and ten cents; and that he have execution therefor.

Afterwards, to wit, on the thirteenth day of said February, in the term and year last aforesaid, the following further proceedings were had in said court in said entitled cause, and entered of record, to wit:

13 DAVID R. CURRAN
v.
GEORGE N. BLACK. } In ejectment.

Now comes the defendant by Messrs. Herndon and Zane, his attorneys, and moves the court to set aside the judgment rendered on the eleventh day of February, A. D. 1868, at the January term of this court, and for a new trial of the same under the statute. And it appearing to the court that all the costs taxed in said cause have been paid by the defendant, it is ordered by the court that the said judgment be vacated and set aside, and a new trial of this cause be awarded.

Then afterwards, to wit, on the tenth day of June, at the June term of said court, in the year last aforesaid, the following further proceedings were had in said court in said entitled cause, and entered of record, to wit:

DAVID R. CURRAN
v.
GEORGE N. BLACK. } In ejectment.

14 By agreement of the parties by their attorneys, it is ordered that this cause be set for trial on Thursday, the eighteenth day of June instant.

Afterwards, to wit, on the tenth day of July, at the June term of said court, in the year of our Lord one thousand eight hundred and sixty-nine, the following further proceedings were had in said court in said entitled cause, and entered of record, to wit:

DAVID R. CURRAN
v.
GEORGE N. BLACK. } Ejectment.

This day come again the parties by their attorneys, and, on motion of defendant, leave is granted to either party to take depositions upon giving ten days' notice to the adverse party.

And afterwards, to wit, on the seventh day of June, at the June term of said court, in the year of our Lord one thousand eight hundred and seventy, the following further proceedings were had in said court
15 in said entitled cause, and entered of record, to wit:

DAVID R. CURRAN
v.
GEORGE N. BLACK. } In ejectment.

This day come the parties by their attorneys, and, by agreement, this cause is set for hearing on Wednesday, the 22nd day of June inst.

Then afterwards, to wit, on the twenty-second day of said June, in the term and year last aforesaid, the following further proceedings were had in said court in said entitled cause, and entered of record, to wit:

DAVID R. CURRAN
v.
GEORGE N. BLACK. } In ejectment.

This day come again the parties by their attorneys, and the issue joined by consent is tried by the court, a jury being waived; and, the court having heard the evidence, this cause is postponed until to-morrow morning for argument of counsel.

16 And afterwards, to wit, on the twenty-fourth day of said June, in the term and year last aforesaid, the following further proceedings were had in said court in said entitled cause, and entered of record, to wit:

DAVID R. CURRAN
v.
GEORGE N. BLACK. } In ejectment.

This day come again the parties; and the court, being now sufficiently advised in the premises, finds specially that John Craddock, the common source of title to the plaintiff and defendant, in the year 1839, acquired by purchase the title in fee to the east half of the lot in controversy, and with his family moved upon said east ; that his dwelling-house was thereon; that he enclosed said east half; that from the time he moved upon said east half, by the permission of the owner (Thomas Mather) of the west half, he used, in connection with the east half, said west half for the purpose of stable-yard, depositing his wood, and in part for his chicken-house; that the only way of access to his stable on the east half
17 was over the west half; that he so continued to use said west half until the year 1853, when he purchased it from said Mather; that he then removed part of the fence dividing the two halves, and which ran north and south, running it west, so as to throw part of said west half into one inclosure with the east half; that thenceforward he used this portion for his kitchen garden, and the remainder of said west half for his stable-yard and wood-yard, and so continuously until two weeks after the execution of the deed conveying said entire lot to Starne & Shutt; that his dwelling-house was all the time on the east half; that said John Craddock was the head of a family, residing with them all the time, and occupying the premises in the manner aforesaid; that in the year 1858, and while said Craddock and his family were so occupying said premises, one David Spear obtained a judgment in the circuit court of Sangamon County, Illinois, against John Craddock, upon which an execution was issued and levied on the said west half, and
18 upon a sale under said execution the said west half was sold to said Spear, and deed made to him in the year 1861 by the sheriff. And the court further finds that the debts against John Craddock, the common source of title of plaintiff and defendant, were contracted after the passage and taking effect of the homestead acts of the State of Illinois; that in the judicial sales through which plaintiff deduces his title through said John Craddock, there was no setting off of lot five, or any part thereof, as a homestead, nor any appraisal of the value thereof, nor any other proceedings under said acts; that said judicial sale was not for purchase-money, and was not for any improvements made on

said premises, or for any debt arising either for purchase-money or improvements; that when said sale was made and said judgment rendered, the said Craddock was with his family occupying the premises in manner above stated, and so continued; and, while so occupying, the said
19 John Craddock and wife conveyed the entire lot in fee-simple by deed with full covenants, releasing the homestead, and properly acknowledged, to Alexander Starne and George W. Shutt, dated and delivered on the 17th day of October, A. D. 1863; that two weeks thereafter the said Craddock with his family removed from said premises, and has never since resided thereon, or on any part thereof, or in any other manner occupied the same.

It was further found by the court that the value of the said west half of said lot exceeds the sum of two thousand dollars.

Whereupon the court found the issue for the plaintiff, and that the defendant is guilty of unlawfully withholding from the plaintiff possession of the premises in his declaration described, to wit: The west half of lot five, (5,) in block one, (1,) in E. Roberts' addition to the town, now city, of Springfield, in Sangamon County and State of Illinois, and to which the plaintiff is entitled in fee-simple.

It is ordered that a writ of possession issue therefor.

It is further ordered and adjudged that the plaintiff recover of
20 the defendant one cent damage, together with the sum of twenty-seven dollars and seventy-eight cents, his costs and charges by him about his suit in this behalf expended; and that he have execution therefor.

Whereupon the defendant enters his motion for a new trial herein, which, being heard by the court, is overruled.

Whereupon the defendant tenders his bill of exceptions to the court, which is signed, sealed, and ordered to be made part of the record in this cause.

And afterwards, to wit, on said twenty-fourth day of June, in the term and year last aforesaid, came said defendant by Messrs. Stuart, Edwards and Brown, his attorneys, and filed his bill of exceptions herein; which said bill of exceptions is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

Cir. court United States, southern district of Illinois, of June term, A. D. 1870.

DAVID R. CURRAN }
vs. }
GEORGE N. BLACK. }

21 Be it remembered that this cause was tried at this term before the court, the Honorable Thomas Drummond, circuit judge of the seventh circuit, and the Honorable Samuel H. Treat, district judge of the southern district of Illinois, without the intervention of a jury, upon the following stipulation filed in said cause:

Stipulation.

DAVID R. CURRAN } Ejectment.
vs.
GEORGE N. BLACK. }

U. S. circuit court, S. district Illinois, June term, 1870.

It is hereby stipulated that this cause shall be tried by the court, without the intervention of a jury.

January 27th, 1870.

JACKSON GRIMSHAW, *P. Q.*
STUART, EDWARDS & BROWN, *P. D.*

(Indorsed:) Filed June 23, 1870.

J. A. JONES, *Clk.*

And thereupon, on trial of said cause, the plaintiff, to maintain
22 the issue on his part, introduced and read in evidence a stipulation and agreement in words and figures following, to wit:

Stipulation.

In the circuit court of the United States within & for the southern district of Illinois, January term, 1869.

DAVID R. CURRAN } Ejectment.
vs.
GEORGE N. BLACK. }

For the purpose of all further trials in this cause, it is admitted—

1. That John Craddock was seized in fee-simple of lot 5, in block No. 1, Springfield, Illinois, in year 1860; and that, by successive conveyances, originating in a judicial sale made by the sheriff of Sangamon County, Illinois, under executions from circuit court of Sangamon County, Illinois, upon judgments in that court on transcripts, the fee in the west fifty-three & ½ feet of the lot, being the premises in controversy in this suit, was before the commencement of this suit vested in the plaintiff; unless by the operation of the homestead laws of the State of Il-
23 linois such judicial sale failed to place title in fee in said plaintiff.

2. It is admitted that the debts against John Craddock, the common source of title of plaintiff and defendant, were contracted after the passage and taking effect of the homestead acts of the State of Illinois.

3. It is admitted that, in the judicial sales through which plaintiff deduces his title through said John Craddock, there was no setting off of lot five, or any part thereof, as a homestead, nor any appraisal of the value thereof, nor any other proceedings under said acts.

4. It is admitted that said judicial sale was not for purchase-money, and was not for any improvements made on said premises, or for any debt arising either for purchase-money or improvements.

5. All questions of fact relating to said alleged homestead of John Craddock are left open for proof, subject to all legal exceptions on either side.

12 January, 1869.

J. GRIMSHAW, *Att'y for Pl'ff.*
HERNDON & ZANE, *for Defendant.*
STUART, EDWARDS & BROWN,
Of Counsel for Def't.

24 (Indorsed:) Filed Jan'y 16, 1869.

J. A. JONES, *Clerk.*

It was further proved by plaintiff in this cause that the sales by the sheriff of Sangamon County, Illinois, through which he claims title, were made in October, A. D. 1859, under judgments of the Sangamon circuit court, Illinois, on transcripts from justices of the peace of said county, of date February, A. D. 1859; and that such sales were of the property in controversy, to wit, the west half of lot five, in block one, E. Roberts' addition to Springfield, Illinois. The sheriff's deed under said sale was dated March 12th, A. D. 1861.

Plaintiff also proved that said Craddock acquired title to the west half of said lot five, block one, E. Boberts' addition to Springfield, Illinois, the premises in controversy, on the first day of November, A. D. 1853, from the representatives of Thomas Mather, deceased; and that said Craddock also acquired title to the east half of lot five, block one, E. Roberts' addition to Springfield, Illinois, previous to that time,
25 by deed from one Morris, on third of September, A. D. 1839.

Plaintiff here rested his case; the foregoing being all the evidence offered by him, together with the parol evidence hereinafter embodied.

Defendant, to maintain the issue on his part, gave in evidence a deed from John Craddock and his wife, dated October 17th, A. D. 1863, to George W. Shutt and Alexander Starne, with the following acknowledgment:

Acknowledgment of deed.

STATE OF ILLINOIS, *Sangamon County, ss:*

Before me, the undersigned, clerk of the county court within and for the county aforesaid, came John Craddock & Rose Craddock, who are personally known to me as the real person by whom and in whose name the above conveyance was executed, and by whom and in whose name the same is proposed to be acknowledged, and who then severally acknowledged their signature thereto to be their free and voluntary act and deed, for the purpose of waiving and releasing all right, title, and interest in and to said land by virtue of the homestead exemption
26 laws of said State, and for all other purposes therein expressed.

And the said Rose Craddock, wife of the said John Craddock, being by me first examined, separate and apart from her said husband, and the contents of the said conveyance being first made known to her, acknowledged that freely and voluntarily, without any compulsion or coercion from her said husband, she executed the same and forever released and waived all right, interest, or title to said land by virtue of homestead exemption laws of said State, and relinquished all her right to the claim of dower in and to the lands and tenements in the said conveyance described.

Given under my hand and seal this 17th day of October, in the year of our Lord one thousand eight hundred and sixty-three.

[SEAL.] N. W. MATHENY, *Clerk.*

Conveying all of said lot five.

And also a quitclaim deed from said Shutt and Starne to James L. Hill and John A. Hughes, dated October 19th, 1863. Consideration, $150 00.

Acknowledgment as follows:

27 *Acknowledgment to quitclaim deed.*

STATE OF ILLINOIS, *Sangamon County, ss:*

I, Noah W. Matheny, clerk county court in and for said county, do hereby certify that the above-named George W. Shutt & Mary Shutt, Alexander Starne & Elvira Starne, who are personally known to me to be the person whose names are subscribed to the foregoing deed as having executed the same, this day in proper came before me and acknowledged that they signed, sealed, and delivered the said deed, for the uses and purposes therein mentioned; and the said Mary Shutt, wife of George W. Shutt, & Elvira Starne, wife of the said Alexander Starne, having been by me made fully acquainted with the contents and purposes of said deed, and by me examined separate and apart from and without the hearing of their said husbands, declared that they signed, sealed, and acknowledged said deed, and relinquished their dower in and to the lands thereby conveyed, freely, voluntary, and without compulsion of their said husbands.

28 In testimony whereof I have hereunto set my hand and seal of office this 19th day of October, A. D. 1863.

[L. S.] N. W. MATHENY, *Clerk.*

And being for the west half of said lot five, block one, in E. Roberts' addition to Springfield, Illinois.

Also a warranty deed from said Shutt and Starne to said Hill and Hughes, dated October 19th, A. D. 1863—consideration, $2,400 00—for the east half of said lot five, block one, E. Roberts' addition to Springfield, Illinois.

The acknowledgment upon said deed was as follows:

Acknowledgment of deed.

STATE OF ILLINOIS, *Sangamon County, ss:*

Before me, the undersigned, clerk county court within and for the county aforesaid, came George W. Shutt & Mary S. Shutt, & Alexander Starne & Elvira S. Starne, who were personally known to me as the real person by whom and in whose name the above conveyance was executed, and by whom and in whose name the same is proposed to be

29 acknowledged, and who then severally acknowledged their signatures thereto to be their free and voluntary act and deed, for the purpose of waiving and releasing all right, title, and interest in and to said land by virtue of the homestead exemption law of said State, and for all other purposes therein expressed. And the said Mary Shutt, wife of George W. Shutt, & Elvira Starne, wife of the said Alexander Starne, being by me first examined separate and apart from her said husband, and the contents of the said conveyance being first made known to her, acknowledged that freely and voluntarily, without any compulsion or coercion from their said husbands, they executed the same, and forever released and waived all right, interest, or title to said land by virtue of homestead exemption laws of said State, and relinquished all their right to the claim of dower in and to the lands and tenements in the said conveyance described.

Given under my hand and seal this 9th day of October, in the year of our Lord one thousand eight hundred and sixty-three.

[L. S.] N. W. MATHENY, *Clerk.*

30 Also a quitclaim deed for said west half of the premises in con-

troversy from said Hill and Hughes to George N. Black; consideration, $1,136 00; date, April 26th, 1865.

Acknowledgment as follows:

Acknowledgment of quitclaim deed.

STATE OF ILLINOIS, *Sangamon County, ss:*

I, Noah W. Matheny, clerk county court in and for said county, do hereby certify that the above-named James L. Hill & Sarah C. Hill, John A. Hughes & Isabella M. Hughes, who are personally known to me to be the persons whose names are subscribed to the foregoing deed as having executed the same, this day, in their proper person, came before me and acknowledged that they signed, sealed, and delivered the said deed for the uses and purposes therein mentioned. And the said Sarah C. Hill, wife of James L. Hill, & Isabella M. Hughes, wife of the said John A. Hughes, having been by me made fully acquainted with the contents and purport of said deed, and by me examined separate and apart from and without the hearing of their said husbands,
31 declared that they signed, sealed, and acknowledged said deed, and relinquished their dower in and to the lands thereby conveyed, freely, voluntarily, and without compulsion of their said husband.

In testimony whereof I have hereunto set my hand and seal of office this twenty-sixth day of April, A. D. 1865.

[L. S.] N. W. MATHENY, *Clerk.*

Also a warranty deed from Hill & Hughes to said Black for the east half of lot five, block one, E. Roberts' addition to Springfield.

The following parol evidence was then introduced:

Parol evidence.

In the circuit court of the United States.

DAVID R. CURRAN } In ejectment.
v.
GEORGE N. BLACK. }

Witnesses for the plaintiff:

JOHN CRADDOCK:

Q. Did you live in Springfield?

A. Yes, sir.

32 Q. Did you live on a lot in the west part of town, on the lot in controversy?

A. I lived upon the east side of the lot in controversy.

Q. Did you buy that lot all together, or did you buy parts of it; if so, what parts first?

A. I bought the east half in 1839.

Q. If you moved upon that lot, when did you move there?

A. I moved there some time in the spring, and built a house upon it.

Q. Did you inclose any of it?

A. Yes, sir; I inclosed it afterwards. There was a branch run down there through it, so I could not close it up entirely.

Q. What did you close up?

A. The east half.

Q. Were you the head of a family?

A. I had a wife and three children.

Q. How long did you live in the house you built upon the east side of the lot?

33 A. Until I let Starne & Shutt have it.

Q. If you bought the other portion of the lot, state when you bought it.

A. I bought the other half in 1853, the west 53½ feet.

Q. What did you do with that half?

A. I had the use of it long before I bought it. Col. Mather turned the town branch, so I could not get to the back of my lot. I used it then as a garden, the front of it. I had a chicken-yard in the back part. I used the back part of the west lot too for wood and hay.

Q. Did you have a stable before you bought of Col. Mather?

A. Yes, sir; the stable was built upon the east half.

Q. How did you get access to that stable before you bought of Mather?

A. After the bridge was moved, then I could not get to the stable without going through this west half, which belonged then to Col. Mather. I used that west half then for wood, and to get to my sta-

34 ble. There was a little chicken-shed I had upon the west side of the stable.

Q. Did you use this west half for any other purpose before you bought it of Col. Mather?

A. I used the back part part of the time, but the front part had to be filled up.

Q. Did you use it to keep your calves or anything?

A. No, sir.

Q. After you bought the west half, what did you do with it towards inclosing it or anything else?

A. Col. Mather had it all inclosed. I took the west half.

Q. What did you do with it after you bought it?

A. I took the northeast fence and moved it west, so as to divide the back part off to itself, where the wood was. I used the front for a garden.

Q. What fence did you move?

A. The one between me and him at that time.

35 Q. That is, between the east half and the west half?

A. Yes, sir; I moved that, and run it east and west.

Q. Would that throw part of the west half in the same inclosure with your house?

A. Yes, sir; about 50 or 60 feet one way, and 53 the other.

Q. What was the part cut off by this fence used for, the back part?

A. A wood-yard.

Q. What was that wood designed for?

A. We had some boarders, and generally cooked for them; the wood was for the family use.

Q. How long did you continue in just that position, or to use the lot in that way?

A. It was in that situation until I sold it to Shutt & Starne; until I made the deeds to them.

Q. Did you continue to live upon the east half during all that time?

A. Yes, sir.

36 Q. What did you claim as your homestead?

(Objected to.)

For what purpose did you occupy that house and lot? What were you doing?

A. After I got burnt out I built the house larger, and occupied it as a boarding-house. I think I was burned out in 1856. I built again upon the same spot on the east lot. I occupied it as a boarding-house until they closed the mortgage. I had it rented out then. I didn't know any day but I would be turned out.

Q. Up to what time did you occupy the house as a residence; up to what time did you reside there?

A. My wife stayed there after I went away.

Q. What year was that?

A. Six or seven years ago.

Q. Was it up to the time you made these deeds to Shutt & Starne?

A. Yes, sir; we rented it out in rooms a little before that time.

37 Cross-examination:

Q. If I understand you rightly, you bought this property at two different times?

A. Yes, sir; the east half first, then the west. I bought the east half of Morris, I think; the west of Mather.

Q. You used that half by a sort of permission from Mather before you bought it?

A. Yes, sir.

Q. Your stable was on your home lot?

A. Yes, sir; upon the east half. The stable was built before I bought it. My chicken-pen was upon the west end of the east lot. It might have been a little of it on the west half.

Q. If it was, that was the only building that was upon the west half?

A. Yes, sir.

Q. When you sold it to Shutt & Starne, did they move on it and make a homestead of it?

A. No, sir; they bought of my wife; they never moved on it.

38 Q. You moved out in the country?

A. Yes, sir; about two weeks after it was sold.

Q. After it was sold under the mortgage?

A. It was not sold for two or three years after the mortgage was closed.

Q. When did you move to the country?

A. I believe it was the first year of the war?

Q. Did your wife go with you?

A. Yes, sir.

Q. Who did you live in the house?

A. After I sold, in a few days, I let Mr. Hill have the key. Shutt & Starnes sold, after a few days, to Hill & Hughes, and I gave the key to them. They gave me the privilege of keeping a few of my things in the house. I left some things there.

Q. Did you give it up as a homestead?

A. If they didn't comply with paying the debts, I didn't intend it should be hanging against me.

39 Q. Why did you move to the country?

A. Because I had a son who went to the war. He left a little place, and I went there to take care of it. It was in his mother's name. My wife went out there because it was her place.

Q. You went out in 1861, and are there yet?

A. Yes, sir; I moved out two or three weeks after I sold.

Q. When you sold to those men, did you live in that house?

A. My wife was there at the house; I was in the country.

Q. Did she move out after you sold out?

A. Yes, sir.
Q. And went to the country and lived with you?
A. Yes, sir.
Q. How long had you been living out in the country before your wife joined you?
A. I had been out there off and on maybe a year; I could
40 not tell precisely. My wife sold the property. I was spreeing it at that time, and sometimes didn't know what I was about. When they bought the property they bargained for both the lots at once.
Q. What family had you when you went to the country in 1861?
A. Two daughters and two sons.
Q. Where did your daughters go?
A. They went out with me; the children didn't move out until my wife did. They came out there in a week or two after the sale to Shutt & Starne.
Q. You have never used the property as a homestead since?
A. No, sir.
Q. You, nor your wife, or daughters? You moved out there in the country, and they followed you, and you have made that your home ever since.
A. Yes, sir.
41 Q. The original house that you occupied was upon the east lot before you went there?
A. Yes, sir.
Q. That was burned down and you built again?
A. Yes, sir.
Q. Upon the same spot?
A. Yes, sir.
Q. None of that house which you built stood upon the west lot?
A. No, sir.
Q. There was a partition fence between your ground and Mather's ground?
A. Yes, sir; in the south part.
Q. How long did that continue after you bought it?
A. I put in some posts that rotted down shortly; then the whole lot was one, except where the stable was; that was kept by itself.
Q. When did you remove the partition fence?
42 A. Before I was burned out; the same year I bought it, I think.
Q. You moved out in 1861, and your family followed you in 1863?
A. Yes, sir. I would come in town once in a while before that.
Q. What did you say about the bridge there?
A. That was moved away and I could not get to my back lot. That is why I came to use the west lot.

Re-direct examination:

Q. For what purpose did you go out to the farm?
A. To take care of it.
Q. Was that merely your temporary home, or was it permanent?
A. It was merely temporary; I came back to town again. I didn't intend to stay out there permanently.

JOHN O. RAMES sworn for plaintiff:

I know John Craddock. I know the lot in controversy.
43 Q. Where did you live while Craddock lived upon that lot?

A. Upon the same street, but a block further up east. I lived there about 20 years.

Q. Did you know this lot at the time Craddock occupied it?

A. Yes, sir.

Q. State whether this lot, particularly the west half of it, was used by Craddock. If so, how was it used?

A. It was used by Craddock, I think, all the time I lived there. My impression is he used it, before he bought it, for a garden and wood-yard. It was his only access to his stable. There was a branch running through there right in the rear. I think it ran upon a part of his land.

Q. You mean the west part of the lot was used by Craddock as a garden and for wood?

A. Yes, sir. I recollect when he first bought the east half; he fenced it up north and south. I think afterwards he moved the front
44 part of that fence and run it east and west.

Q. Did he use any part of west half in connection with the east half after that?

A. Yes, sir; I don't think there was any fence separating them after that.

Q. How long did he continue to use that in that way?

A. I think up to 1861 or '2.

Q. When did he move to the country?

A. I think in '62 or '3.

Q. Did he use it up to the time he went to the country?

A. Yes, sir; he resided upon the east side of the lot, keeping a boarding-house. I think he had three children.

Cross-examination:

Q. What time did Craddock move away from that house?

A. My impression is in 1862 or '3; I am not positive.

45 Q. Has there ever been any building put there since the old one burned down?

A. No, sir.

JAMES GOURLEY for plaintiff:

I live in Springfield, and have for 35 years. I know the land in controversy, and know of John Craddock living there. He had a house upon the east half; also a stable upon the line of the west half, but on the east half. I was there very frequently; had four or five hands boarding there.

Q. State how Craddock used the entire lot, both parts of it.

A. He had a garden upon the front of the west half, on the north part of it, and wood-yard upon the south. There was a fence run across east and west dividing the north from the south part of the west half. It continued in that way until his house burned down.

46 Cross-examination:

Q. Who was living in that house when it burned down?

A. Craddock moved to the country, and his wife hung on to the homestead a long time and would not give it up. I think Hill & Hughes were trying to get her out, but she still hung on to it until it burned down, or about that time.

Q. What time did she go out in the country?

A. It must have in '61 or '2. She tried to keep boarders after Craddock went away. The house was vacant awhile about the time it burned down. I don't know whether Mrs. Craddock had moved everything she

had away or not. She blamed somebody for burning it down. I think she and her daughters lived in the house during the first two or three years of the war. I think she hung on to it as long as there was any possible chance for her to live there. It has been 4 or 5 years since the house burned down. Black has never lived on this lot, nor
47 Shutt, Starne, Hill, nor Hughes.

Re-direct examination:

Q. You say Mrs. Craddock was in that house claiming the homestead as against Hill & Hughes. Was not that after you had heard they had sold out to Hill & Hughes?

A. Yes, sir; I know she used to give Hill & Hughes "jesse."

Q. Was it not Hill & Hughes that were claiming it when she was claiming it?

A. Yes, sir; I thought Hill & Hughes got the property very cheap. I saw her in there after that. I don't know what sale it was. I know Hill & Hughes tried to get hold of the house.

Q. Do you know the property was sold to Hill & Hughes long before she relinquished her homestead?

A. I think it was a good while.

(Closed.)

48 For the defendant:

Mrs. CRADDOCK sworn for defendant:

I am wife of John Craddock, live 6 miles in the country, and have for about 6 years, with my family.

Q. How long had your husband lived out there before you lived there?

A. He used to go out there and stay off and on every year.

Q. Was your house in town burned down before you moved to the country?

A. No, sir; it was burned over a year after I left it.

Q. Was it vacant when it burned up?

A. Yes, sir; it was. I had vacated it over a year before it burned up.

Q. Was any member of your family living in the house at the time it was burned up?

A. No, sir.

Q. Had they been for more than a year?

49 A. No, sir; not that I recollect. We all went away together. I am no scholar. I can't keep date; but I say as near as I can judge. I know it was the first of November. I moved out, I think, in the third year of the war.

Q. How long had the house been vacant before it was burned?

A. I can't tell exactly; it was nearly a year, I guess. I recollect coming from the country in a wagon, and found all the doors open, and saw cow tracks all through the house. It was open that way a good while before it was burned; I think about a year or nearly. It was burned in the summer, I think. I know I lived there fall before.

Q. Did you ever live upon the west part of the lot?

A. No, sir. I think I lived in the house twenty years. I used the west part for a kitchen garden.

Cross-examination:

Q. Where did you and Mr. Craddock live at the time you made
50 the deed to Shutt & Starne?

A. On this lot, and before I made the deed. I moved out in two weeks after I made the deed.

Q. Where was Mr. Craddock's home then?

A. He made his home with me, of course, his regular home. I washed for him. There is one word in my signing that deed. When I was leaving the house, upon the door-step Mr. Shutt requested that I should sign him that corner lot, and I told him no, sir, I would not sign it; somebody had bought it. That was the west half.

Q. You told Shutt when you signed the deed that somebody else had bought that lot?

A. Yes, sir.

Q. Under judgment?

A. Yes, sir. He told me he would make it all right with me. I refused him three times. He has not made anything right.

51 JOHN CRADDOCK recalled:

With reference to the value of the lots, in 1858, east lot was worth three thousand dollars; west, one thousand dollars.

(This under objection.)

Defendant at the time objected to the question propounded to the witness, John Craddock, in relation to the value of the east half of lot five, block one, E. Roberts' addition to Springfield, Illinois; and also to the evidence of said Craddock as to the value of the west half of said lot five, the premises in controversy in this case. The court received the evidence of said Craddock as to the values of said east and west halves of said lots, subject to the opinion of the court as to the competency of said evidence. To which ruling of the court defendant then and there excepted.

The foregoing was all the evidence offered by either side of the case.

And thereupon, from said testimony, the court found as follows:

52 Specially, that John Craddock, the common source of title to the plaintiff and defendant, in the year 1839 acquired by purchase the title in fee to the east half of the lot in controversy, and with his family moved upon said east ; that his dwelling-house was thereon; that he inclosed said east half; that from the time he moved upon said east half, by the permission of the owner (Thomas Mather) of the west half, he used, in connection with the east half, said west half for the purpose of stable-yard, depositing his wood, and in part for his chicken-house; that the only way of access to his stable on the east half was over the west half; that he so continued to use said west half until the year 1853, when he purchased it from said Mather; that he then removed part of the fence dividing the two halves, and which ran north and south, running it west, so as to throw part of said west half into one inclosure with the east half; that thenceforward he used this portion for his kitchen garden, and the remainder of said west half for his stable-yard and wood-yard, and so continuously until two weeks

53 after the execution of the deed conveying said entire lot to Starne & Shutt; that his dwelling-house was all the time on the east half; that said John Craddock was the head of a family, residing with them all the time, and occupying the premises in the manner aforesaid; that in the year 1858, and while said Craddock and his family were so occupying said premises, one David Spear obtained a judgment in the circuit court of Sangamon County, Illinois, against John Craddock, upon which an execution was issued, and levied on the said west half, and, upon a sale under said execution, the said west half was sold to said Spear, and deed made to him in the year 1861 by the sheriff. (As to this sale, and the debt for which the judgment was rendered, and conveyance, the court finds as follows: That the debts

against John Craddock, the common source of title of plaintiff and defendant, were contracted after the passage and taking effect of the homestead acts of the State of Illinois; that in the judicial sales
54 through which plaintiff deduces his title through said John Craddock, there was no setting off of lot five, or any part thereof, as a homestead, nor any appraisal of the value thereof, nor any other proceedings under said acts; that said judicial sale was not for purchase-money, and was not for any improvements made on said premises, or for any debt arising either for purchase-money or improvements.) That when said sale was made, and said judgment rendered, the said Craddock was, with his family, occupying the premises in the manner above stated, and so continued; and, while so occupying, the said John Craddock and wife conveyed the entire lot in fee-simple by deed, with full covenants releasing the homestead, and properly acknowledged, to Alexander Starne and George W. Shutt, dated and delivered on the 17th day of October, A. D. 1863; that two weeks thereafter the said Craddock, with his family, removed from said premises, and has never since resided thereon, or on any part thereof, or in any other
55 manner occupied the same. It was further found by the court that the value of the said west half of said lot exceeds the sum of two thousand dollars. Whereupon the court found the issue joined for the plaintiff, and that the plaintiff was the owner of the premises in controversy; to which finding defendant then and there excepted.

And upon which said finding the court rendered judgment that plaintiff recover said premises in fee, and have a writ of possession for said premises and an execution for costs herein; to which rulings of the court defendant then and there excepted.

To preserve all which matters of record, defendant asks that this his bill of exceptions be signed and sealed by the court; which is done.

S. H. TREAT. [SEAL.]

(Indorsed:) Filed June 24, A. D. 1870.

J. A. JONES, *Clk.*

56 Afterwards, to wit, on the second day of July, in the year last aforesaid, a writ of error was issued in said entitled cause; which said writ is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the circuit court before you, between David R. Curran, plaintiff, and George N. Black, defendant, a manifest error hath happened, to the great damage of said George N. Black, as by his complaint appears; we, being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment
57 be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of the next term thereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this second day of July, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth.

[SEAL.]

J. A. JONES,
Clerk of the Circuit Court of the U. S.
for the Southern District of Illinois.

58 And afterwards, to wit, on said second day of July, at the June term of said court, in the year last aforesaid, the following further proceedings were had in said court in said entitled cause, and entered of record, to wit:

DAVID R. CURRAN
v.
GEORGE N. BLACK. } In ejectment.

And now again comes the defendant and tenders his bond of appeal herein in the penalty of five hundred dollars, with John Williams as surety, which is approved by the court and ordered to be filed.

Bond of appeal.

Supreme Court of the United States.

DAVID R. CURRAN
v.
GEORGE N. BLACK. } In ejectment.

Know all men by these presents that I, George N. Black, as principal, and John Williams, as surety, are held and firmly bound unto
59 David R. Curran in the sum of five hundred dollars, to be paid to the said David R. Curran, his executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this second day of July, A. D. 1870.

Whereas the above-named George N. Black has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named George N. Black shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

GEO. N. BLACK. [SEAL.]
JOHN WILLIAMS. [SEAL.]

Sealed and delivered in presence of—

Approved:

S. H. TREAT, *Dist. Judge.*

(Indorsed:) Filed July 2nd, 1870.

J. A. JONES, *Clerk.*

60 Whereupon, on said second day of July, in the term and year last aforesaid, a citation was issued in said entitled cause; which said citation is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

To David R. Curran, greeting:

You are hereby cited and admonished to be and appear at the next term of the Supreme Court of the United States, to be holden at Washington, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein you are the plaintiff and George N. Black is the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness Samuel H. Treat, district judge of the United States for the southern district of Illinois, and one of the judges of the circuit
61 court of the United States for said district, this second day of July, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth year.

S. H. TREAT,
District Judge.

Which said citation was afterwards, to wit, on the eighth day of July, of the year last aforesaid, returned by the marshal of said district, indorsed in the words and figures following, to wit:

James E. Hill, deputy United States marshal for the southern district of Illinois, after being duly sworn, deposes and says that he has duly executed the within citation by delivering a true copy of the same to Mess. McClernand and Broadwell, on the 7th day of July, 1870, and by delivering a true copy of the same to Jackson Grimshaw on the 8th day of July, 1870, they being the attorneys of the within-named David R. Curran.

JAMES E. HILL,
Deputy U. S. Marshal So. D. Ill's.

62 Subscribed and sworn to before me this 8th day of July, A. D. 1870.

J. A. JONES,
Clerk U. S. Circuit Court Southern Dist. of Illinois.

(Indorsed:) Filed July 8th, A. D. 1870.

J. A. JONES, *Clerk.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, J. A. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the foregoing sixty-one pages contain a full, true, and complete transcript of all the processes issued, papers filed, and proceedings thereon had in a certain cause wherein David R. Curran is plaintiff, and George N. Black is defendant, as fully, truly, and completely as the same appear of file and of record in my said office.

In witness whereof I have hereunto set my hand and official seal at Springfield, in said district, this tenth day of August, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fifth year.

[SEAL.] J. A. JONES, *Clerk.*

[Five-cent internal revenue stamp affixed and canceled.]

(Indorsement on cover:) No. 483. George N. Black, plaintiff in error, vs. David R. Curran. S. Illinois C. C. U. S.

Filed 9th September, 1870.

O

Supreme Court of the United States.

GEORGE N. BLACK, Plaintiff in Error.

Vs.

DAVID CURRAN, Defendant in Error.

ARGUMENT FOR PLAINTIFF IN ERROR.

IN THE SUPREME COURT OF THE UNITED STATES.

GEORGE N. BLACK, *vs.* DAVID R. CURRAN. } Error to the Circuit Court of the Southern District of Illinois.

I.

STATEMENT OF FACTS.

This is an action of ejectment brought by Curran against Black, to recover possession of the west half of Lot 5, in Block one, of E. Roberts' Addition to Springfield. Both parties derive their title through John Craddock: Curran through a deed made by the Sheriff of Sangamon county, Illinois, under a sale made upon an execution issued from said court upon judgment against said Craddock; Black, through deeds from Craddock and wife.

The facts as found specially by the court, (the cause having been tried without a jury,) are as follows:

John Craddock, the common source of title to the plaintiff and defendant, in the year 1839 acquired, by purchase, the title in fee to the east half of the lot in controversy, and with his family moved upon said east half; that his dwelling house was thereon; that he enclosed said east half; that from the time he moved upon said east half, by the permission of the owner (Thos. Mather) of the west half, he used in connection with the east half, said west half for the purpose of stable yard, depositing his wood, and in part for his chicken house. That the only way of access to his stable on the east half was over the west half; that he so continued to use said west half until the year 1853, when he purchased it from said Mather; that he then removed part of the fence dividing the two halves and which ran north and south, running it west, so as to throw part of said west half into one enclosure with the east half; that thenceforward he used this portion for his kitchen garden, and the remainder of said west half for his stable yard and wood yard, and so continuously until two weeks after the execution of the deed conveying said entire lot to

Starne & Shutt; that his dwelling house was all the time on the east half; that the said John Craddock was the head of a family, residing with them all the time and occupying the premises in the manner aforesaid; that in the year 1858 and while said Craddock and his family were so occupying said premises, one David Spear obtained a judgment in the circuit court of Sangamon county, Illinois, against John Craddock, on which an execution was issued and levied on the said west half, and upon a sale under said execution the said west half was sold to said Spear, and deed made to him in the year 1861, by the sheriff.

That the debts against John Craddock, the common source of title of plaintiff and defendant, were contracted after the passage and taking effect of the homestead acts of the state of Illinois; that in the judicial sales through which plaintiff deduces his title through said John Craddock, there was no setting off of Lot Five, or any part thereof, as a homestead, nor any appraisal of the value thereof, nor any other proceedings under said acts; that said judicial sale was not for purchase money, and was not for any improvements made on said premises, or for any debt arising either for purchase money or improvements, that when said sale was made, and said judgment rendered, the said Craddock was, with his family, occupying the premises in manner above stated, and so continued, and while so occupying the said John Craddock and wife conveyed the entire lot in fee simple, by deed with full covenants, releasing the homestead and properly acknowledged, to Alexander Starne and George W. Shutt, dated and delivered on the 17th day of October A. D. 1863; that two weeks thereafter the said Craddock with his family removed from said premises, and has never since resided thereon, or on any part thereof, or in any other manner occupied the same.

Upon the trial the plaintiff below offered to prove by John Craddock the value of the west half and east half of said lot, to which the defendant objected as being incompetent and irrelevant in this case. The objection was overruled, and to this decision the appellant at the time excepted.

II.

THE LAW OF THE CASE.

The questions presented arise wholly from the statutes of the state of Illinois, known as the homestead laws, and the construction thereof in relation to the lien of judgments, and the proper mode of enforcing the rights of the judgment creditors by a sale under execution, of the lot occupied by a judgment debtor as a homestead.

Upon the preliminary question, whether at the time of the sale under execution in 1859, and deed in 1861, through which defendant in error

claims title, the lot was occupied as a homestead, it will not be necessary to spend much time.

The facts in relation to the occupancy of the parts of the lot sufficiently appear in the finding of the court. The question is, was John Craddock occupying the premises as a homestead at the time the judgment was rendered in 1858, and the deed made in 1861? The answer cannot be doubtful. If there had been two different lots so occupied, they would still, under the construction of this and similar statutes, under circumstances shown by the evidence, have constituted the homestead. In this case both parts make but one lot. The following authorities are sufficient to establish this proposition.

Thornton vs. Boyden, 31 Ill. 200 & seq.

"Where a householder has his dwelling house upon a town lot, and is farming the lot, together with a tract of land adjoining, all in the same inclosure, it is competent for him to prove that the whole premises constitute his homestead."

Rheinback vs. Walters 27 Ills. 394.

"The dwelling house, the smoke house, the stable, the horse lot, and the grounds connected therewith for domestic and family purposes constitute the homestead."

Hancock vs. Morgan 17 Texas R. 582

"A homestead in a town may include several lots, and if used, or by reasonable presumption to be used for the convenience of the family they need not be contiguous."

So to the same effect Ackley vs. Chamberlain 16 California R. 181.

The stipulation of the parties, and the finding of the court, establish all the other requisite facts, that Craddock was the head of a family residing with them on the premises, that the debt for which the judgment was rendered was contracted subsequent to the passage of the "homestead" laws, and was not of the class protected from the exemption by the laws aforesaid.

The whole of the lot then, at the date of the rendition of the judgement, the sale, and the sheriff's deed, and up to and for two weeks subsequent to the date of the deed by Craddock and wife to Starne & Shutt, through whom plaintiff in error derives his title in 1863, was in the actual occupancy of John Craddock and family as his and their homestead.

The statutes of the state of Illinois in relation to homesteads are as follows:

HOMESTEADS.

CHAPTER 48, GROSS' STATUTE. Page 327.

(Laws 1851, page 25.)

SECTION 1. "In addition to the property now exempt by the law from sale under execution, there shall be exempt from levy and forced sale, under any process or order from any court of law or equity in this state, for debts contracted from and after the 4th day of July 1851, the lot of ground and buildings thereon, occupied as a residence, and owned by the debtor, being a householder and having a family, to the value of $1,000. Such exemption shall continue after the death of such householder, for the benefit of the widow and family, some or one of them continuing to occupy such homestead, until the youngest child shall become 21 years of age, and until the death of such widow, and no release or waiver of such exemption shall be valid unless the same shall be in writing subscribed by such householder and his wife, if he have one (see §7) and acknowledged in same manner as conveyances of real estate are by law required to be acknowledged."

SEC. 2. "But no property shall by virtue of this act be exempt from sale for non payment of taxes or assessments or for a debt or liability incurred for the purchase or improvement thereof."

SEC. 3. "If in the opinion of the creditors or officer holding an execution against such householder, the premises claimed by him or her as exempt, are worth more than $1000, such officer shall summon six qualified jurors of his county, who shall, upon oath to be administered to them by the officer, appraise said premises and if, in their opinion, the property may be divided without injury to the interest of the parties, they shall set off so much of said premises including the dwelling house, as in their opinion shall be worth $1.000, and the residue of said premises may be advertised and sold by such officer."

SEC. 4. "In case the value of the premises shall in the opinion of the jury be more than $1000, and cannot be divided as provided for in this act, they shall make and sign an appraisal of the value thereof, and deliver the same to the officer, who shall deliver a copy thereof to the execution debtor, or to some one of the family of suitable age to understand the nature thereof with a notice thereto attached that unless the execution debtor shall pay to said officer the surplus over and above $1000, on the amount due on said execution, within 60 days thereafter that such premises will be sold."

SEC. 5. "In case such surplus, or the amount due on said execution, shall not be paid within the said 60 days, it shall be lawful for the officer to advertise and sell the said premises and out of the proceeds of such sale to pay to such execution debtor, the said sum of $1000, which shall be exempt from execution for one year thereafter, and apply the balance on such execution, provided that no sale shall be made unless a greater sum than $1000, shall be bid therefor, in which case the officer may return the execution for want of property."

SEC. 6. "The costs and expenses of setting off such homestead, as provided herein, shall be discharged and included in the officer's bill of costs upon such execution."

(Laws 1857, p. 119, 17 Feb.)

SEC. 7. "The first section of * * * [the foregoing act is] amended by inserting after the words "subscribed by such householder" the words "and his wife, if he have one" it being the object of this act to require in all cases, the signature and acknowledgment of the wife, as conditions to the alienation of the homestead."

That a defence under this statute can be set up in the action of ejectment has been repeatedly decided by the supreme court of Illinois.

Patterson vs. Kriegh 29 Ills. 518–19.
Thornton vs. Boyden 31 ib. 211.
Pardee vs. Lindley ib. 187.
Connor vs. Nichols ib. 153.

On the trial the court admitted, against the objection of appellant, evidence of the value of the premises in 1858. (Folio 51 of Record.) That such evidence was improper has been decided by the supreme court. In Pardee vs. Lindley 31 Ills. 187, the court says: "It was then competent to show in this action of ejectment that the premises were the homestead and protected by the law; and that they *exceeded in value one thousand dollars* was *immaterial* in this kind of action." And that this is correct is manifest from the provisions of the statute. If the premises were only worth one thousand dollars, then the exemption is absolute—if they are worth more, then the statute specifically provides the mode by which that can be ascertained, and the further proceedings to be had upon such ascertainment. The mode is by a jury summoned for the purpose, who are upon inspection to decide upon the value, and also upon the divisibility of the premises, and a copy of whose appraisement is to be delivered to the judgment debtor. §§ 3, 4 & 5 of the act.

Upon a trial of an action of ejectment the court has no authority to admit a different mode of ascertaining the value. If the provisions of the statute were not complied with by the officer, and the premises were either susceptible of division, or worth more than $1000, the sale was wholly unauthorised.

But moreover on this point, the proof was as to the value in 1858. Now the finding of the court and the evidence show that John Craddock acquired title to the east half in 1839—to the west half in 1853—and was then and continuously thereafter occupying the same as his residence. The "homestead" act was passed in 1851. If evidence of value could be admissible on the trial of an ejectment suit, where title is derived, as in this case, through a sheriff's deed, it could only be for the purpose of negativing the claim of the lot as a "homestead." But in such case to what point of time, we ask, is such evidence to be directed? We answer to the time when the right to the exemption first accrued. To hold otherwise in a time and state where the price of real estate is so fluctuating, often increasing with unexpected and unparalleled rapidity, would be in effect to deprive a judgment debtor of any benefit of the exemption, even as to the $1000. If this lot had only been worth $1000, and occupied as a homestead by Craddock at the time of the judgment and sale by the sheriff, the circuit court would not, we submit, have hesitated a moment in finding for appellant. But suppose in 1853, when Craddock acquired the title to the entire lot, it was not worth $1000,

shall the rise in the value of the property be permitted to deprive him of the benefit of the statute? That, in admitting and acting upon this evidence, the court erred, we submit, is certain. If the lot was occupied as a homestead, then its value could only be ascertained as pointed out by the statute. This was not done. There was no evidence of the value at any other time than 1858—prior to the conveyance to appellant.

Assuming that the facts show the occupation of the entire lot as a homestead, does the plaintiff show any title to the premises?

Waiving for the present the main question decided by the court below as to the lien of the judgment, and the right of Craddock and wife to sell and convey the property unincumbered by the supposed lien, the plaintiff, to recover, must not only show a valid judgment, but he must also show a valid execution, a regular levy, and an authorized sale.

The stipulation of the parties and the finding of the court show that none of the requisitions of the homestead laws above quoted were complied with. Assuming the lien to exist and the premises to exceed in value the sum of $1000, how is this lien to be enforced? The act of 1861, *ubi supra*, provides in detail the manner, time, and circumstances under which levy and sale can be made. These provisions are not merely directory, the omission of which would only constitute irregularity not vitiating the sale, but are mandatory, prerequsite to the right to sell. They are, by the decision of the supreme court, *prohibitory* of a sale in any other way. Bliss vs Clark 39 Ills. 596–7. "It was however insisted, that the removal of Conklin to Iowa was such an abandonment as rendered the premises liable to sale under the prior judgment. This is true; but there being no lien, and the creditor being *prohibited* by the statute from levying or selling the *property* while it was *occupied* as a homestead, and the execution on the junior judgment being first issued and levied after it became *liable* to sale, the senior judgment became thereby postponed, and the execution on the junior judgment became preferred." So also in New Hampshire. Fogg vs. Fogg, 40 N. H. 282. Tucker vs. Kuniston 47 ib. 267.

Can a sale under execution of the lot occupied as a homestead by the judgment debtor, made during such occupancy, (the judgment not being for a debt incurred for the purchase or improvement of the premises or any part thereof,) without compliance with any of the requisitions of the stutute in such cases made and provided, pass the title to the premises to the purchaser?

The circuit court in this case so decided, and that the title under the sheriff's deed would vest when the debtor ceased to occupy the premises, notwithstanding he and his wife had by deed, executed and delivered before leaving the premises, in good faith and for valuable consideration, conveyed the lot to the grantors of the plaintiff in error.

The correctness of this decision is to be determined by the proper construction of the statute. A reference to the decisions of the supreme

court of Illinois will show that this judgment is in irreconcileable conflict with the construction of the act by that court.

Green v. Marks 25 Ills. p. 221.

"A judgment and execution do not create a lien against the homestead of the judgment debtor, and the owner may sell or mortgage it free from the lien "of the judgment."

As this is the leading case we quote freely from the opinion. After citing the statute the court say: "Does the judgment become a lien upon the homestead, which is postponed by the operation of the statute, until any of the conditions cease to exist, that creates the lien, or does the statute fail to create such lien?" * * * "By this enactment the debtorfalling within its provisions, is required to perform no act, to discharge no duty, or even manifest any intention to avail himself of its benefits. The law casts it upon him, but at the same time has provided the means by which he may, if he shall choose, waive that benefit; but until he does so, or until some one of the circumstances, which is essential to the operation of the statute, ceases to exist, the exemption continues by its own force. But when the law has cast this exemption upon the debtor, it will be discharged from that condition, when the debtor ceases to occupy it as a residence, shall cease to have a family, or shall release or waive it in writing, subscribed and acknowledged by him in the same manner in which deeds are required by law to be acknowledged. The question recurs, when the lien, if ever, attaches to such property.', * * * *

"The judgment lien upon lands, then, being conferred by statute alone, and not as a common law right, it can only attach and become effective in the mode, at the time, and upon the conditions and limitations imposed by the statute itself. Our statute is not in aid of a common law right to sell real estate, but it confers the right * * * The legislature have manifested in an unmistakable manner, the design to secure the debtor and his family after his death in the enjoyment of a home. They have carefully guarded the right, when the tract of land is of greater value than the amount of the exemption, by having the homestead of that value set off to him, if susceptible of a division, and if not, then on a sale, one thousand dollars is required to be paid to him. Nor does the statute stop here, as it exempts this money from the payment of his debts for one year, that he may have ample time to secure him another home. The whole tenor of the act seems to be, to preserve this benefit, unless he shall deliberately abandon it. And if a liberal provision had not been designed, it occurs to us, that such studious care would not have been manifested, to guard and protect this right. The framers of the law were doubtless familiar with the decisions of this court, which held, that under the law exempting sixty dollars worth of property, suitable to the condition of the debtor, he cannot select any article of a greater value than that amount, and re-

tain it, by paying the surplus, but by this enactment have provided against the loss of the homestead to the debtor in case it is of greater value than the exemption. In case of Cole & Green, 21 Ill. 104, we held, under the act exempting certain chattels from sale on execution, etc. as to such property no judgment, execution or attachment, can exist. That the judgment creates no lien on such property, and the execution creates no power over it. It, by law, is placed beyond the reach of either, unless it is by the voluntary affirmative act of the owner; that the law will only recognize it for the protection of the owner in its enjoyment. And that he might sell or mortgage it, and thus bring it within the influence of the law regulating the transfer of property, but in doing so, the purchaser or mortgagee acquires title as free from the judgment and execution as it existed in the hands of the debtor. In each of the acts making these exemptions it appears to us, that the legislature intended, not only to free it from the liability to sale, but from all lien, while the debtor is in the position to claim the benefits of the statutes. Under this act it leaves the parties, as they were at the common law. And under this statute the defendant holds the homestead exempt, as though the judgment had never been rendered, or the execution had never issued. They created no lien, as the law has placed it beyond their reach, and as in the case of personal property, the owner may sell or mortgage it, free from a lien of the judgment.

It then follows if the debtor ceases to be the owner, before any lien has attached, the purchaser acquires it, free from liability to the judgment. And when the property has thus vested in him, no liability can attach to it, in his hands, for the debt of his grantor. It not being under a lien or liable to sale when he purchased, he must acquire and hold it, in the same condition. After the debtor conveyed, he ceased to have any interest liable to execution. The decree of the court below must, therefore, be reversed, and the cause remanded."

Bliss vs. Clark, decided in 1864, 39 Ills. 590 & seq. "A judgment lien does not attach to a homestead. While premises remain exempt from levy and sale, under the homestead law, they are in the same situation with reference to a judgment lien, as though no judgment existed against the owner." When the homestead exemption shall, from any cause, cease to exist, and the premises become liable to levy and sale, then the first levy thereafter will bind the property, whether the writ is issued upon a senior or junior judgment." The court, p. 595. expressly refer to, and reaffirm the doctrine of, Green v. Marks.

In Ives v. Mills 37 Ills. in construing the act in relation to rights of mortgagees the court say, p. 76, "What rights did the mortgagee acquire by this sale to Scudders? Did they acquire any they did not possess before the sale? We think not, and as the defendant in error had the capacity to *sell* and *convey* his homestead *free* from the mortgage, the mortgage not containing any relinquishment of the homestead right, could

not affect this right. It was inoperative as to it. The principles of the case of Green v. Marks 25 Ill. 226, are applicable to this case and must control it."

Hume et al vs. Gossett 43 Ills. 297 & seq. decided in 1867.

This was a bill in chancery filed to set aside sales of lands, claimed as a homestead, made upon judgments. The supreme court affirmed the decree of the circuit court, setting aside the sales, and perpetually enjoining against collecting the judgments out of the lands. The court say: "The plaintiff in error makes this single question upon this record: Is a judgment against a town collector, on his official bond, a lien upon his homestead?"

This question they answer, p. 299, "Although the collector's bond be a lien on all the real estate of the maker of it, so is a judgment; but as this court said in *Green vs. Marks* 25 Ills. 221 a judgment was not a lien upon the homestead. If the bond be a lien, and the judgment rendered upon it also a lien, it is one which, under the decisions of this court, *cannot be enforced*, as against the homestead, *except in the mode pointed out in the statute.*" "Pardee v. Lindley 31 Ill. 187": "In our view of this legislation, the homestead right is protected against all *liens* and *sales*, and against all modes of conveyance, whether by deed absolute or by mortgage, unless it shall be released or disposed of in the mode prescribed in the act."

This homestead right may in some cases be taken from the owner, as where the land on which it arises is of value exceeding $1000. *On paying* that amount to the claimant it may be sold under an execution. * * The policy of the law, as we have often said, was to secure a home for the unfortunate debtor and his family, and to be secure from the reach of creditors *except in the mode prescribed by the law.*"

Thus has the supreme court of this state by a series of decisions settled that a judgment is no lien upon the lot occupied as a homestead, and that the same may be conveyed unincumbered by any judgment. As a rule of property it has existed for ten years. Titles to many valuable tracts, and lots, of land have been acquired on the faith of this construction. The title of the grantors of plaintiff in error, was so obtained in 1863. The judgment in this case unsettles these titles and prescribes a different rule. We had supposed, in the United States courts, the construction of a state statute by the supreme court of such state, whether correct or not, founded on good or insufficient reasons, would have been conclusive. We insist that, both upon principle, and authorities of every state having homestead laws, the doctrine asserted by the circuit court in this case, that, without complying with any of the terms of the homestead law, and in a mode not pointed out by the law, the sheriff can divide the homestead lot, levy on part, sell and convey it, while in the occupancy of the judgment debtor, and that the deed so made will convey title to take effect when the occupation by the debtor, of the lot ceases, is incorrect and

in conflict with the decisions of all the states—is in effect a judicial repeal of the law.

The effect and validity of the deed depends upon the validity of the levy and sale; if these were unauthorized, the deed of the sheriff is a nullity. The authority to sell is derived from the statute. What is it that is exempt from sale? Not some ideal homestead right estate, leaving another imaginary reversionary interest which can be subjected to the debts of the occupant. No. The exemption from *levy and forced sale*, is of *"the lot of ground and buildings."* The *thing* out of which about, and in which, all the different kinds of estate arise, cannot be levied on, or sold, except in the mode provided. If the *lot* is exempt from levy and sale, every conceivable estate in and to said lot must also be exempt. It is no answer, to say that the exemption is only to the value of one thousand dollars, for the very manifest reasons, that the detail provisions are by the express words of the statute, made to apply only where, in the opinion of the creditor, the premises exceed in value $1000; then, and then only, can he demand through the sheriff, a jury to ascertain the value, and divisibility, of the premises, and upon notice to the judgment debtor, after the expiration of 60 days, may he sell. By the proviso to the 5th section, no sale can be made unless more than $1000 shall be bid. The very carefully defined provisions, made by the legislature, to protect the judgment debtor in his homestead right, in a case where, in the opinion of the creditor, the value of the lot exceeds $1000, the circuit court have decided are not necessary in the only possible case in which they could have any application.

By making these provisions in all cases essential, no one can be injured. If the premises are only worth $1000, then, nothing can be done. If the creditor, at any time, conceives them to be worth more, he can instantly secure his claim by proceeding in accordance with the statute. If he chooses to remain inactive until the judgment debtor conveys, the loss is the result of his negligence.

When the Legislature provided a particular mode by a jury viewing the premises, and at the very time of the levy, there ascertaining the value of the premises, they certainly did not contemplate that for this protection against sacrifice of the right they granted, there might be, by a court, substituted that most uncertain of all evidence, the opinion of witnesses 12 years after the sale, as to the value at the time of sale.

But, in the opinion of the judge of the circuit court, verbally announced at the time of the judgment, it was attempted to obviate the force of the express decisions of the supreme court, by endeavoring to show that, in decisions upon other questions growing out of the statute, there was a seeming inconsistency with the position laid down in Green v. Marks, and the other cases cited. Assuming, for the sake of the argument, that this is true; we insist, that so long as those decisions remain unreversed, not only the law of comity, but the security of property in a state, re-

quires that the United States courts should follow that decision; and such has hitherto been the rule. The cases of McDonald vs. Crandall, 43 Ill. 231 & seq. and Coe *et al* vs. Smith *et al* 47 Ill. 225, were relied on by the court. Now in the first case the court expressly refer with approval p. 237, to Green v. Marks, and the opinion in the latter simply refers to the former case as controlling it.

These were cases of voluntary conveyances to grantees of the person claiming the homestead right. The case now before the court involves a sale *in invitum*. This distinction would of itself be sufficient to demonstrate the inapplicability of these decisions.

But, the court in these cases did not decide that a deed failing to release the homestead was, or could be, by and of itself, a valid conveyance of the title, by virtue of which the grantee might maintain ejectment against the grantor, or his grantees occupying the premises under conveyances from him. By no means. They do decide, that the irregular deed, and the *surrender* of the premises to the *grantee* of that deed constituted an abandonment of the homestead to *that grantee*, so as to estop the claim of the grantor, and all claiming through him. It was the concurrence of the *voluntary deed and voluntary surrender*, that operated the destruction of the right. On page 237, 43 Ills., the court say "the question then arises whether a grantee, by a deed which fails to release the homestead exemption, becomes invested with the right to hold the premises when the vendor has abandoned the possession, ceased to occupy them as a homestead and placed his purchaser in *possession*." * * * "When the grantor conveys the premises, *and places the grantee in possession* of the homestead, we must hold that he thereby abandons it and the right to insist upon the exemption." That there is no inconsistency between these decisions and Green v. Marks, is evident. In Brown vs. Coon, 36 Ill. p. 248, the court say: "It is true we have decided in *Green* v. *Marks* 25 Ill. 221, and Bliss v. Clark, that the homestead owner may, by deed executed by himself and wife, in conformity with the statute, transfer the premises, discharged from any incumbrance arising from a prior judgment. Only by recognising this *jus disponendi*, can the homestead be clothed with its full value to the owner. But this principle is not at all in conflict with the rule that the right is lost by voluntary abandonment. Where the homestead is conveyed, either with or without an express statutory relinquishment, and actual possession is given by the grantee by the voluntary withdrawal of the husband and wife, the homestead *as to such grantee, and persons claiming under him, and in his and their favor* is abandoned, *but only as to them*. As to third persons, the homestead right cannot, with any propriety, be said to have been abandoned merely by being transferred. The owner has made such use of it as he deemed most to his advantage, in order to procure for his family a more eligible home."

In Fishback vs. Lane, 36 Ill. 438–9, after referring to the cases of

Bliss v. Clark and Brown vs. Coon: "The deduction from these cases is, that where actual possession is voluntarily delivered by the owner and his wife to the grantee, the latter will hold discharged of the lien of a prior judgment, even though the deed has no waiver of the homestead right. These cases proceed upon the ground that the owner, by delivering actual possession to his grantee, abandons the homestead as *to him*, and is estopped from setting up a further claim, although the deed contains no waiver, but that the act of selling, as *to other persons* than the grantee, is not an abandonment, but rather an express assertion of his homestead right, to be protected in order to render that right complete, and in no way exposing the homestead to the lien of a prior judgment."

In the case, now before the court the possession was surrendered to the grantees of the deed under which plaintiff in error claims, and he was in possession thereunder when this suit was commenced.

Such is the law as laid down by the supreme court of Illinois, and under these decisions, whether the judgment be, or be not, a lien on the premises, or on the surplus over $1000, any sale under execution, while the lot is in the occupancy of the judgment debtor, is positively prohibited, and it, and the deed made in pursuance thereof, are absolute nulities. Even if the judgment debtor had abandoned the premises without conveying to any one, the deed would not by relation convey title, because the sale having been made at a time, and in a manner prohibited, was unauthorized and void; as much so as if no judgment had been rendered.

We propose now to show, that such is the law in every state, where similar exemptions exist.

NEW YORK.

Allen v. Cook, 26 Barbour R. 374 & seq.:

The language of the 1st section of the law of New York is substantially the same as that of Illinois. In this case, the court holds that, while the judgment may be a lien, its operation is suspended, and there can be no sale under execution during the occupancy of the judgment debtor.

"It is to be observed that the act was not intended to discharge, and does not in fact discharge, absolutely, the lien of the judgment. It *suspends* its operation however. The property is to be exempt from *sale on execution*, during the life of the debtor, provided he continues to be a householder, and during the life of his widow, if he leaves one, and until his youngest child arrives at the age of 21 years, if they continue to occupy such homestead." p. 378.

The *lien of judgment* upon the exempt realty is *clearly preserved*, but the *remedy is suspended* until the debtor ceases to be a householder." p. 380.

Smith and others vs. Bracket. 36 Barb. 571. The court holding the judgment to be a charge, on 573, say, "which charge, however *could not be euforced* by execution until the waiver was executed and acknowledged."

IOWA.

Lamb vs. Shays et al 14 Iowa, 567,

"It will readily be perceived the only question thus presented is, whether the lien of a judgment attaches to the homestead that is exempt from judicial sale, or to the same effect, whether the property claimed as a homestead, can be transferred by the owner thereof, free from the effect of a judgment rendered against him, while he occupied the same as a homestead.

Section 4105 of the revision of 1860, provides that judgments in the Supreme or District Courts of the state are liens upon the real estate owned by the defendant at the time of such rendition. Section 3247 provides the manner of enforcing a judgment, that is, by execution.

The lien of a judgment upon lands in this state being conferred by statute, it can only have such force as is given thereby, and it can only attach or become effective in the manner, at the time, and upon the conditions and limitations imposed by the statute itself. A lien without the power to enforce it, carries with it no advantage to the owner thereof. It cannot be enforced as against the homestead, because it is exempt from judicial sale. It is inoperative, and cannot be otherwise, as long as the homestead is used as a home."

* * * If, therefore, this lien does not attach so as to be effective against the owner, how can it affect the rights of a purchaser of the homestead property?

The right of the exemption continues until the sale and delivery of the deed to the vendee, and the lien cannot attach until after the sale and delivery, nor until after it ceases to be occupied by the owner. Prior to this the vendee's rights become absolute." pps. 569–70.

In this case, judgments had been rendered against O'Brien, while in the occupancy of the lot as a homestead. After the rendition of the judgments, O'Bryen sold and conveyed the premises to Shays. Shays subsequently executed a mortgage to Lamb, the complainant; and the court held, that the conveyance to Shays, passed the title of the property discharged of the judgments—holding the judgments no lien.

WISCONSIN.

While it is held that a judgment is a lien on the homestead, it was further determined, that the remedy, by forced sale under execution, was suspended during the occupancy, and could not be enforced until that

ceased. Hoyt vs. Hone, 3 Wis. R. 752. Simmons vs. Johnson, 14 Wis. 527.

NEW HAMPSHIRE.

Fogg vs. Fogg, 40 N. H., R. 282 & seq.

In this case, it was held that the extent of an execution on the lot occupied as a homestead, without compliance with the provisions of the statute in relation to appraisement, &c., was absolutely void.

"As respects the debtor then, the extent must be deemed inoperative and void. As to the homestead when it does not exceed in value $500, it must be clearly so; and if it do exceed that value, the sheriff, upon due application, should cause a homestead to be assigned, and then proceed against the surplus. On this point he has no discretion; his duty is imperative, and he might as well sell at auction, land which is not under mortgage or other incumbrance. This summary mode of determining and selling out the homestead, is wisely provided by law, and the debtor has an interest in it, which no sheriff can disregard. If the homestead is worth more than $500, how much shall be set off to him, is to be determined at once by suitable appraisers. If in their judgment it cannot be divided, they may appraise it, and the debtor by paying the excess beyond $500, may retain the whole; otherwise the sheriff may sell the whole, if it bring over $500, and pay that sum to the debtor." p. 288.

While these provisions are similar to those in Illinois, no application by the judgment debtor is necessary in the latter, to make them imperative on the sheriff.

Tucker vs. Kenniston, 47 N. H., R. 267 & seq., the doctrine of Fogg vs. Fogg, reasserted:

"It is said in the argument for the defendant that his purpose was to sell only the reversion of the homestead, or the plaintiff's interest subject to that right." (and a similar contention was made by his honor judge Drummond, in deciding this case.) "It will be observed however that the case presented to us, shows no such limitation, and if it did, it could not effect the result, because it must be considered as settled by the case of Fogg vs. Fogg, 40 N. H, 282, that the homestead is altogether and absolutely exempt from levy and sale upon execution If it were otherwise, and it could be set off or sold upon execution, subject to the homestead right, it will readily be seen that the debtor's right would practically be limited to the mere occupation of the property as a homestead, and that he could neither exchange it for another, nor mortgage it, because the moment he left it, the creditor would come into full possession, and as therefore the title of a mortgagee would depend wholly upon the contingency that the debtor continued to occupy the property as a homestead, no prudent person would be likely to loan money upon such security. In this way by depriving a debtor of all use of the homestead,

except the mere occupation of it, a creditor might contribute largely to a state of things that would drive his debtor from the homestead into the poor house, as suggested in plaintiff's bill, and in that way obtain a complete title to the property. We are satisfied, however, that nothing of this kind was contemplated in the act, but that the debtor was to be left at full liberty to sell, exchange or mortgage his homestead, subject only to the claims of his wife and minor children. * * After quoting the provisions of the act, "under these provisions it was held in Fogg vs. Fogg, 40 N. H. 282, before cited, that the officer could proceed in respect to the homestead only in the mode pointed out in the statute, and, therefore, that the extent of the execution upon the whole land, without first setting out a homestead after due application was wholly inoperative and void, even as to the surplus beyond the value of $500; and we think it is quite apparent from the terms of that section, that no sale of any interest, as a reversion or otherwise in the land so set off was contemplated."

Further arguing as to what it is, that is exempt from forced sale, the term "homestead" being used in this statute, the court proceed to show that by the use of this term, not some estate contingent or reversionary in the premises was exempt, but the "*property* in which the homestead right exists; "the tenement itself, and not the title or estate in it, that is exempt." In Illinois construction in this respect is unnecessary. The first section exempts the *lot* of ground, occupied as a homestead, from forced sale—the lot, whether worth the $1000 or more, except as provided in the act.

MINNESOTA.

Tolson vs. Carli, 5 Minnesota R. 337–8.

While holding the judgment to be a lien, yet it could only be enforced by a sale after the judgment debtor ceased to occupy.

It thus appears that, while some of these courts hold that the judgment is a lien upon the homestead, that the exemption is a personal privilege, which cannot be transferred by a conveyance of the property; and others hold that, a judgment does not become a lien on the premises occupied as a homestead, and the premises may be transferred free from all such incumbrance, they all agree in holding that the exemption is complete from any forced sale under execution during the occupancy by the debtor or his family, except in the manner provided by the statute—that during, this period the lien is suspended, or inoperative, except as above stated.

The result under one set of decisions is that the grantee of the judgment debtor would hold the property free from incumbrance; in the other that he holds it subject to a sale under execution *after* the transfer, upon a judgment rendered prior to his purchase, an incumbrance, which he may discharge by payment, and still retain his title.

But no court has gone to the extent of holding, that while a lot is occupied as a homestead, under statute prescribing the detailed provisions prerequisite to a sale, as in this state, the sheriff may assume the lot to be worth exceeding $1000, arbitrantly divide it without appraisement or jury, sell a portion, and by his deed pass a title to that portion, to take effect at some future period, when the lot shall have been conveyed, or ceased to be occupied. If the lot is exempt by the law, from forced *sale* during the occupancy of the judgment debtor, then, a sale during that time is unauthorized and void, whether or not the judgment be a lien. Any other decision is, we repeat, a judicial repeal of the law.

REPLY

TO ARGUMENT FOR DEFENDANT IN ERROR.

In the argument of Mr. Grimshaw, the fact that the entire lot was occupied as a homestead, is not, as indeed it could not be, seriously controverted. The finding by the court, (page 7, printed record,) is, that when the sale was made and judgment rendered, under which defendant in error claims, "Craddock was, with his family, occupying the premises, in manner above stated, and so continued; and *while* so occupying, the said John Craddock and wife conveyed the entire lot in fee simple by deed with full covenants, releasing the homestead, and properly acknowledged, to Alexander Starne and George W. Shutt, dated and delivered on the 17th day of October, A. D. 1863; and that two weeks thereafter the said Craddock with his family removed from the premises, &c. Which finding is in perfect accord with the evidence of Craddock (pps. 12, 13, 14, of record,) and of Mrs. Craddock (p. 16.) as also of the other witnesses. By the written stipulation, title in fee to the premises in Curran is not admitted, unless such title passed by the judicial sale, under which he claims. Whether it so passed, was the very question in controversy. The stipulation was but part of the evidence, and made merely to save the introduction of the deeds and records; and as to these sales the court finds (pps. 6 & 7 of the printed record,) that "in the judicial sales through which plaintiff deduces his title through said John Craddock, there was no compliance, or attempt at compliance, with the provisions of the homestead laws." The question is not as to the effect of a removal from the premises, without a conveyance thereof, so as to let in the lien of a judgment, if any such lien existed, but, whether a sale made under a judgment while the premises were occupied as a homestead, without regard to any of the requirements of the statute, will pass the title as against a conveyance properly executed by Craddock and wife while in the occupancy of the premises.

It is urged by Mr. Grimshaw, that, the Supreme Court of Illinois have not settled the question in relation to the lien of a judgment upon a homestead. We had endeavored in a former argument to show, by the decisions of that court, a rule which they had clearly announced in 1860, and from which they have not only not departed, but which they have taken pains often to repeat. Since the writing of the former argument we have received the 48th Illinois, containing a case to which

reference is made by Mr. Grimshaw, viz: Hewitt vs. Templeton, 48 Ills. 368, 9–70. An examination of the decision in this case shows no departure from the rule in relation to the lien of a judgment, and the manner of enforcing it; but it is a direct affirmance of the rule as we have contended it to be. On page 359 the court say: "The question upon which this case turns has already been decided in the case of "McDonald vs. Crandall, 43 Ills. 231." We there held that, although a judgment was no lien upon a homestead, where the premises were worth less than $1000, and a lien only upon the surplus, w ere they were worth more than that sum, yet where the owner conveys the same by an absolute deed or mortgage, legally executed, the fee in the premises conveyed, *no matter what their value*, passes to the grantee, subject only to the right of occupancy on the part of the grantor, in case the homestead has not been relinquished, and when such occupancy terminates, the homestead right is annihilated, it not being an estate which can be transferred as against a *former conveyance* that has passed the fee." By referring once more to McDonald vs. Crandall, 43 Ills. p. 237, and upon which the case in 48 Ills. was decided, it shall be found that the supreme court draw the distinction between a voluntary conveyance and an involuntary transfer by operation of a judgment, which the circuit court ignored; and, moreover, that they quote as still of binding obligation, the case of Green vs. Marks. "The question then arises, whether a grantee, by a deed which fails to release the homestead exemption, becomes invested with the right to hold the premises, when the vendor has abandoned the possession, ceased to occupy them as a homestead, and placed his purchaser in possession. As between these parties, there can be no question but that he may. Brown vs. Coon, 36 Illinois, 243. But it is contended, that the homestead right is a species of estate, that can only be released by a deed of conveyance. In the various cases which have heretofore come before the court, where the right has been protected as against grantees and judgment creditors, the vendor or the debtor has been in possession of the homestead, never having abandoned it, or placed the purchaser in possession. The question has not previously arisen between two *voluntary* grantees, in the conveyance to one of whom the exemption was released, and not to the other. In the case of Green vs. Marks, 25 Ills. 221, it was held, that the debtor being entitled to the benefit of the act, could sell the premises, and transfer the possession free from a judgment lien, as none attached. And in the case of Bliss vs. Clark, 39 Ill., 590, it was held, that the grant of the homestead to a junior judgment creditor, with a surrender of the possession, would hold against a sheriff's deed, on a sale made under a prior judgment, whilst the premises we e occupied as a homestead by the debtor." And on page 236, "It has also been repeatedly held that the homestead right was not subject to a judgment lien. That the right could be tranferred with the fee, and the

grantee would take it notwithstanding a judgment was in existence against the grantor, when the conveyance was made."

When in Hewitt vs Templeton, 48 Illinois, page 369, the court say, that a judgment is a lien upon the surplus over the one thousand dollars, it is not to be inferred that they meant to assert that a valid sale could be made without ascertainment of this surplus in the mode pointed out by the homestead act, and without paying, previously, to a sale after such appraisment, the $1000 to the debtor, and also without compliance with any other provisions of the act. We have already shown that these provisions of the statute were not merely directory, but that compliance was an essential to a valid sale. See authorities quoted by us on pages 6 and 9 of former argument.

We affirm with confidence, after thus reviewing every case which has heretofore been decided by the court, that the following clear rule of property has been definitely settled by the Supreme Court of Illinois since the year 1860, viz: *That a deed conveying the lot of ground occupied by the grantor as his homestead, properly executed and delivered, while the grantor was in the occupancy of the premises, will pass the title divested of any liens by judgment, or of any sales under prior judgments unless made in compliance with the detailed provisions of the act known as the homestead law.*"

Under this rule a great number of deeds and mortgages have been executed, conveying or encumbering tracts of land so occupied, under the advice of skilled conveyances and attorneys.

The application of this rule to the facts of this case decides it in favor of Black's title.

The aid of this court is invoked by the attorney for defendant, to declare a construction of the statute which will reconcile what he asserts to be "the inconsistent decisions of our court." Denying the absence of a rule of property controlling to the state courts, and any inconsistencies in the Illinois decisions, we most respectfully submit, that, if this court is to determine a new rule for Illinois, on the authorities which we have quoted from this and other states, no decision could possibly be made, which could qualify the title derived from the deed by Craddock and wife to grantors of plaintiff in error, further than, that, he holds his title subject to a lien of the judgment to be hereafter enforced in the appropriate way according to the statute.

It has never been denied that, if the debtor abandoned the homestead *without* having made conveyance, a judgment against him could be enforced against the premises by sale under execution in the ordinary way, and to this effect, only, are the decisions quoted on the other side. Such is not this case. The conveyance was made while the lot was occupied as a homestead; the possession of the property was surrendered by Craddock to Hill and Hughes, purchasers from Starne & Shutt, un-

der the title conveyed by said deed. (Craddock's testimony, p. 13 record.) "Shutt & Starne sold after a few days to Hill and Hughes and I gave the key to them."

As to the value of the premises, and the exception taken to the proof of that fact on the trial—if it shall be conceded that the occupant of a homestead can convey the premises free from the lien of a judgment, if the value does not exceed one thousand dollars, of what worth would such a conveyance be, if made dependent upon the testimony of witnesses years after, as to the value at the time of conveyance? If in an action of ejectment the opinion of witnesses should be, that the premises were worth one thousand and *one* dollars his title fails. The supreme court of the state, it is not denied, has decided the proof excepted to, incompetent in an action of ejectment. This is too much a rule of evidence affecting title to real estate to justify this court in disregarding the decisions of the Illinois court.

The finding by the court that the *present* value of the premises was over 2,000 dollars, so as to show that the writ of error was properly issued, does not affect the question, nor compromise the exception; that related to proof of the value at the time of the alledged sale, for the purpose of sustaining the sale under which the sheriff's deed was made.

LYMAN TRUMBULL,
For Plaintiff in Error.

STUART, EDWARDS & BROWN,
of Counsel.

SUPREME COURT OF THE UNITED STATES.

No.

GEORGE N. BLACK,

vs.

DAVID R. CURRAN.

IN EJECTMENT. CIRCUIT COURT UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS.

ARGUMENT FOR DEFENDANT IN ERROR.

GEORGE N. BLACK,

vs.

DAVID R. CURRAN,

IN EJECTMENT. CIRCUIT COURT UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS.

Suit in Ejectment commenced the 2d of July, 1866.

Plea filed, "not guilty," p. 3, paper book.

And joinder, p. 4.

Trial on 1st February at January Term, 1867, without jury, and on 11th of February, 1868, to-wit: at January term, 1868, the Court finds defendant, Black, the present plaintiff in error, guilty of unlawfully withholding from said Curran possession of the west half of Lot 5 in Block 1, in E. Roberts' addition to the town of Springfield, Illinois, and that the estate, established in the plaintiff Curran, was in fee simple. The Court thereupon entered a judgment upon said recovery, according to its force, form and effect, and ordered a writ of possession thereon, and also for costs of said suit.

Afterwards, and on the 11th of February, 1868, during the January term, 1868, of said Court, on payment of costs under the rules of said Court, said judgment was vacated, and a new trial awarded.

Afterwards, on the 22d of June, 1870, the case was re-tried before the Hon. Thomas Drummond, Circuit Judge, and the Hon. Samuel H. Treat, District Judge of the Southern District of Illinois, upon a written stipulation, filed in said cause, that the case should be tried by the Court without the intervention of a jury.

On trial of the case (p. 8.) it was admitted in writing that John Craddock was seized in fee simple of Lot 5 Block 1, Springfield, Illinois, in the year 1860, and that by successive conveyances originating in a judicial sale, under executions from Circuit Court of Sangamon county, Illinois, made by the Sheriff of said county, upon judgments in said Court, the fee in the premises in controversy in this suit, to-wit: the west fifty-three and one-half feet of Block 1, in Roberts' addition to Springfield, Sangamon county, Illinois, was, before the commencement of the suit, vested in David R. Curran, the plaintiff herein; unless, by the operation of the Homestead Laws of the State of Illinois, such judicial sale failed to place title in fee, in said David

R. Curran. It was admitted that the debts against John Craddock, who was the common source of title, of said Curran and said Black, were contracted after the passage and taking effect of the Homestead Laws of the State of Illinois.

That in the judicial sales through which said Curran deduces this title from said Craddock, there was no setting off of said Lot 5, or any part thereof as a Homestead. And that said judicial sale was not for purchase money, nor for improvements on the premises, nor for any debt arising for purchase money or improvements thereon.

The judgments under which the plaintiff below (Curran) claims were rendered in February, 1859, and the said west half of Lot 5 in Block 1, Springfield, Illinois, was conveyed by the Sheriff of Sangamon county, Illinois, under said judgments and sale, of date 12th of March, 1861.

Craddock acquired title to said west half of above described lot, on 1st of November, 1853, from the representatives of Thomas Mather, deceased.

He, Craddock, acquired title to the east half of Lot 5 Block 1, E. Roberts' addition to Springfield, Illinois, by deed from one Morris, date 3d September, 1839. The foregoing is all the evidence of said plaintiff in said case, except, as afterwards appears, in the paper book.

On p. 9, paper book, appears, of date October 17th, 1863, to a deed, an acknowledgment of John Craddock and Rose Craddock, his wife, to George W. Shutt and Alexander Starne, with attempted waiver of Homestead and relinquishment of dower by said Mrs. Craddock in all of said Lot 5.

There is a quit claim deed from said Shutt and Starne, dated Oct. 19th, 1863, to James L. Hill and John A. Hughes, professing in consideration of $150 to convey the whole of said Lot 5.

P. 10. Acknowledgment from Shutt and Starne and their respective wives, simply conveying and relinquishing dower in and to the west half of said Lot 5 Block 1 in E. Roberts' addition to Springfield, Illinois.

Also, a Warranty deed from said Shutt and Starne to said Hill and Hughes, date Oct. 19th, 1863, consideration $2,400, for east half Lot 5 Block 1, E. Roberts' addition to Springfield, to which deed for said east half of said Lot, (which east half is not in controversy in this case,) there is a waiver of Homestead and of dower rights.

The attention of the Court is respectfully asked to the marked contrast between the acknowledgment of the quit claim deed consideration, $150, p. 9 and 10, for the west half of said Lot 5, the property in controversy, and on p. 10 consideration $2,400 for east half of same Lot, with a full relinquishment both of Dower and Homestead right.

There is no controversy in this suit about the east half of said Lot 5 Block 1, E. Roberts' addition to Springfield, Illinois.

Curran, the plaintiff below, is seeking to recover the west half of said Lot 5, Block 1.

It will appear from the record, that on the 26th of April, 1865, Hill and Hughes and their respective wives made and acknowledged to George N. Black a deed of quit claim, for the west half of Lot 5, the premises in controversy, consideration $1,136.

On p. 11, it will appear that the acknowledgment of said quit claim deed for said west half of Lot 5, contained on the part of Mrs. Hill and Mrs. Hughes, parties thereto, only a relinquishment of dower.

On p. 11, there appears to be a Warranty deed from said Hill and Hughes, to said Black, for the east half of said Lot 5, E. Roberts' addition to Springfield, consideration not given.

The Court will see throughout the whole testimony in the case a very marked distinction between the evidence in this case, so far as it relates to the premises in controversy, to-wit: the west half of Lot 5 Block 1, E. Roberts' addition to Springfield, and the east half of Lot 5 Block 1, E. Roberts' addition to Springfield.

There is a manifest effort on the part of counsel for Black, the present plaintiff in error, to confound the west half of Lot 5 Block 1, E. Roberts' addition to Springfield, now in controversy, with the east half of the said Lot 5, Block 1, about which there is no controversy. And in determining the only question in the case, I wish to confine the discussion of the case to the west half of said lot.

The paper book and record show the acknowledgment of a deed from John Craddock and wife, which was dated Oct. 19th, 1863, for the whole Lot, also for the west half of Lot 5 Block 1, a deed of quit claim from Shutt and Starne to James T. Hill and John A. Hughes, consideration $150, with no relinquishment of Homestead rights, see pages 9, 10. On 19th October, 1863, said Shutt and Starne conveyed the east half of Lot 5 Block 1, E. Roberts' addition to Springfield, with full relinquishment of dower and full release of Homestead rights; p. 10. Hill and wife and Hughes and wife, p. 11, acknowledge a conveyance in the usual form, without release of Homestead rights by quit claim to George N. Black, the present plaintiff, for the *west half Lot 5 Block 1*, E. Roberts' addition to Springfield, and by Warranty deed said Hill and Hughes conveyed to said Black the east half of said Lot 5 Block 1, E. Roberts' addition to Springfield.

The question in the case involves the construction of the Homestead Laws of Illinois, in connection with the laws of that State vesting titles in fee, and in relation to judgment liens and the transfer of titles by execution sales, to which I will hereafter refer. The facts connected with the Homestead rights, I will now give to the Court in brief from the paper book, and afterwards refer to the statutes of the State of Illinois, and to the decisions of the Supreme Court of Illinois in relation to the construction of the Illinois Homestead laws. I insist that the construction of the Homestead laws of other States should have neither bearing nor control over the real property laws of the State of Illinois. I respectfully ask the Court, after the decision of his Honor, Judge Treat, in this case, and the decision of his Honor, Judge Drummond, Circuit Judge, both concurring in favor of Curran, the defendant in error, after examining carefully the law of real property of Illinois, that the decisions of other States construing Homestead laws, cannot control the Illinois Homestead Law, and I propose to quote the Illinois decisions in brief. The able review of those decisions by Judge Treat and Judge Drummond should be conclusive.

The Illinois State decisions are conflicting, but can be reconciled and result in what has been twice decided in this case, viz: that Curran had title after the Craddock family abandoned the so claimed homestead. I now proceed, before quoting the Illinois decision, to give an abstract of the evidence spread out by the counsel for the plaintiff in error, in detail. This John Craddock, through whom this title passed, states, as a witness for Black, that he lived on the east

half of the Lot in controversy; that he bought the east half of the lot in 1839; moved upon that east half in the spring and built a house upon it; afterwards enclosed it, not entirely; a branch ran down through it; he was the head of a family; had a wife and three children; he lived in the house he built upon the east side of the lot until he let Starne and Shutt have it; I bought the west fifty-three and a half feet of the lot in 1853; I had used it before I bought it for a garden and chicken yard, and for wood and hay; my stable was on the east half; I got to it by going through the west half, which belonged to Colonel Mather; after I bought of Col. Mather I moved the fence between the east and west halves, and ran it east and west, which would throw the west half about 50 or 60 feet one way and 53 feet the other, in the same enclosure with the east half on which my house was. The property so continued until I made the deeds to Shutt and Starne; I continued to live upon the east half of the Lot until I sold to Shutt and Starne. My house was burned in 1856; I built again in same spot on east lot; occupied it until they closed the mortgage. I had it rented out then; I did not know any day but I would be turned out; my wife stayed there after I went away, which was six or seven years ago, and about up to the time we deeded to Shutt and Starne.

On cross-examination witness stated that he bought the east half first of Morris, and then the west half of Mather; used the west half by a sort of permission from Mather before he bought it. The stable was built, before I bought it, on the east half; the chicken pen was on the west end of the east lot; it might have been a little on the west half; Shutt and Starne bought of my wife, and they never made a Homestead of it; they never moved on it; I moved into the country about the first year of the war; my wife went with me; after I sold I let Mr. Hill have the key; Shutt and Starne sold a few days after to Hill and Hughes, and gave the key to them; I went to the country because I had a son who went to the war; he had a little place; the title was in his mother's name; my wife went out because it was her place; we went out in 1861, and are there yet; I moved out two or three weeks after I sold; my wife was in the house, I was in the country; she came out and lived with me; I was in the country off and on maybe a year before my wife joined me; we had two daughters and two sons; the children came out in a week or two after the sale to Shutt and Starne. *We have never used the property as a Homestead since.* The home we occupied was on the *east half*, and was burned down and re-built; there was a partition fence between my part and Mather's part, on the south part of the lot. which was removed the same year I bought it; I moved out to the country in 1861, and my family followed me to the country in 1863.

John O. Barnes, for Black, testified that Craddock used the east and west halves of the lots up to 1861 or 1862; that he moved to the country in 1862 or 1863; that he lived upon the east half of the lot, keeping a boarding house; that the building on the east half was burned down, and has not since been re-built.

James Gornley testified for Black that Craddock had a house on the east half of the lot; a stable on the east half but on the line of the west half; Mrs. Craddock went to the country in 1861 or 1862; the house was vacant awhile about the time it burned down; she and her daughters lived in the house the first two or three years of the war; it has been

four or five years since the house burned down. Black has never lived on this lot, nor has Shutt, Starne, Hill or Hughes.

For Curran.—Mrs. John Craddock swore that she was the wife of John Craddock, and has lived for about six years out in the country with her family; her husband used to go into the country and stay, off and on every year. *I had vacated the house in town over a year before it was burned; so had all my family;* this was about November of the third year of the war, (1864); I recollect coming from the country in a wagon, and found the doors open, and saw cow tracks all through the house; it was open that way for nearly a year before it was burned; I lived in the house for 20 years; I used the west part for a kitchen garden.

On cross-examination Mrs. Craddock states that in two weeks after she made the deed to Shutt and Starne she moved out; that Craddock made his regular home with her; that Shutt requested her to sign the deed for west half of the lot; that she told Shutt three times she would not, that some one else had bought the lot under judgment.

John Craddock, being recalled, testified in behalf of Curran that the east half of the lot named was worth $3000 in 1858, and the west half of the lot in controversy was worth $1000.

This is all the evidence offered on either side.

Chapter 24, title conveyances, Revised Code of Illinois, 1845, provides that livery of seizin shall in no case be necessary for the conveyance of real property, but every deed, mortgage, or other conveyance in writing, signed and sealed by the party making the same, the maker or makers being of full age, &c., shall be sufficient without livery of seizin for the giving, granting, selling, mortgaging, leasing, or otherwise conveying or transferring any lands, tenements, or hereditaments in this State, so as to all intents and purposes absolutely and fully to vest in every donee, grantee, bargainee, mortgagee, lessee, or purchaser, all such estate or estates as shall be specified in such deed * * or other conveyance. Nothing herein contained shall be so construed as to divest or defeat the older or better estate or right of any person or persons not party to any such deed, mortgage, lease, or other conveyance.

Chapter 57, Revised Code of Illinois, 1845, provides that all and singular the * * lands, tenements, and real estate of every person against whom any judgment has been or hereafter may be obtained in any court of record, either at law or in equity, for any debt, damages, costs, or any sum of money, shall be liable to be sold on execution to be issued upon such judgment, and the said judgment shall be a lien on such lands, tenements, and real estate from the last day of the term of the Court in which the same may be rendered for the period of seven years, * * provided execution issue within a year on such judgment, and after seven years it shall cease to be a lien on real estate, as against *bona fide* purchasers, or subsequent encumbrancers, by mortgage, judgment, or otherwise. * *

The above statutes of the State of Illinois are still in full force and in daily operation and use, except so far as the Homestead Laws of said State, together with the rescripts of the Supreme Court of the State of Illinois have modified or controlled them. The above laws are the rule of real property in Illinois. On page 4 of the argument filed on behalf of Black, the plaintiff in error, will be found correctly copied the Illinois statute of 1851, originally providing for homestead

rights, and on the same page will be found the Illinois statute of 1857, adding to the provisions of the former law the words: "and his wife, if he have one." The statutes of 1851 and 1857 are crude. The Supreme Court of the State of Illinois, instead of leaving them as they were passed by the Legislature, has undertaken by rescripts to amplify and enlarge them, and in doing so has got into a confusion of decisions hard to be reconciled. While the law may be that this Court is bound by the decisions of a State Court, as a rule of property, with all deference to the extremely *able* Supreme Court of the State of Illinois, when these conflicting opinions were enunciated, I submit to this Court, that no man with a logical mind can deduce a rule of property from the inconsistent and contradictory decisions of the Supreme Court of the State of Illinois, touching the operation of the Homestead Laws of that State upon real property therein, and the interests of creditors or vendees in Illinois, and that the Supreme Court of the State of Illinois to-day cannot do it.

I propose to turn the attention of the Court, by quotations made in the inverse order of the date of the decisions of the Supreme Court of the State of Illinois, on the subject of homestead rights, as decided by that Court.

In the case of Buck vs. Conlogue, 49 Illinois, 392, Buck having homestead rights, died, leaving a widow and one minor child; the widow married, and with her minor child moved to the home of her second husband. The Court say that attempted proof of an indefinite purpose to return, did not do away with the actual abandonment by her, and that the mother's abandonment was an abandonment by the child, the mother's home being the child's home. But from sickness or other necessary cause, if she (the mother) were temporarily to leave the homestead, with intent of returning, it would be otherwise.

In Hewitt vs. Templeton, 48 Illinois, 369, the Court decides that homestead right is not a fee, and that when occupancy of homestead ceases, homestead right is annihilated, it not being an estate in the premises which can be transferred, as against a former conveyance *that has* passed *the fee.*

In Maher vs. McConaga, 47 Ills., 394, the Court say that in Cabeen vs. Mulligan, 37 Ill., 235, it was held that a debtor removing from the State, remaining two years, abandoned his homestead, no matter what he may have said before or after his return, and that he left the homestead, after he ceased to occupy it, liable to execution. That the family left and went to Nebraska, and never returned to former homestead to live, and the homestead was liable to levy and sale, under execution for owner's debt.

In Fergus vs. Woodworth et al., 44 Ill., 376, the Court say: * * It is not pretended that Fergus and wife resided on the premises. It appears that when mortgage was given, several portions of the house were occupied by other persons, and so continued until after the sale by the master ("under foreclosure of mortgage"). The Court then describe the building, and say that after the spring of 1860, Fergus occupied the north store of the building as a printing office, while he resided with his family on another street in another house, thus excluding the idea that the property in controversy was his homestead, whatever might have been his intention of returning to it. The Court further decide that he had abandoned the premises as a homestead, and as against a mortgage to one Sears, and lost his homestead

rights. That to permit the assertion of a homestead, where, in the opinion of the Court, there was a clear abandonment of it, would lead to the perversion of the law into an engine of fraud and wrong.

In Titman vs. Moore, 43 Ill., p. 172, the Court say, that a removal by Moore from his farm, the renting of it to a tenant for three years, and Moore's renting and living in a house in Canton, Ill., six miles distant from his farm, was an abandonment. That the husband must "occupy premises as a residence," while of necessity children of tender years, when both parents were dead, might occupy by tenant or otherwise. And that a return by the head of the family (the father) did not revive the homestead right.

The Court in case of Cabeen vs. Mulligan, 37 Ill., 235, say: The question presented is whether Cabeen abandoned his homestead, so that a judgment previously rendered became a valid lien. Cabeen went to Minnesota with his family, and remained there two years; the Court say it is manifest he left with intent to abandon his home, and that his return did not restore his homestead rights. That while the Court has not held that under all circumstances actual residence is essential, yet, as a general rule, it is requisite to protect the homestead from sale under execution. * * It may become necessary, when the husband is dead, and especially so when both parents are dead, and the children entitled to the benefit of the law are of tender years, that a residence by a tenant may be substituted for an actual occupancy by the widow or the children. But it is only in such cases and under peculiar circumstances that the actual residence of the person claiming the benefit of the act, can be dispensed with. * * In this case, we think that a removal by himself and family for the period of two years, * * and ceasing to occupy the premises, was evidence of an abandonment. What he said before or after his return has no reference to the question; it could not change the question, whether he had ceased to occupy his homestead, or not. If he might remove his family and effects to another state, and remain there with them for two years, we are at a loss to conceive how long an abandonment it would require to subject it (the Court means the homestead) to the payment of his debts.

Cabeen vs. Mulligan, 37 Ill., pp. 235–236.

And as Court say in the same case:

To permit such an abandonment without rendering the property liable to forced sale, would be to enable debtors to perpetrate frauds upon creditors, that could not have been designed by the General Assembly, when the act was adopted.

In Brinkerhoof vs. Everett et al., 38 Ill., 266, the Court say: Infant children do not abandon, when through their guardian they rent to a tenant.

I can only argue this case from the deductions to be made from our local statutes and decisions. It is admitted by stipulation in the case, that plaintiff below, Curran, had title in fee, deduced from a first source of title, "allodial," if the word is proper. That plaintiff below, Curran, was entitled to recover, unless the homestead laws defeated his right.

The homestead laws were passed, whether wisely or unwisely, to preserve a homestead for a man, his wife, and minor children. On

examination of the inconsistent decisions of the Illinois Supreme Court, no fixed rule of real property can be deduced. The nearest we can come to a decision of the Supreme Court of Illinois, is on the question of abandonment. The Supreme Court of Illinois decides that abandonment forfeits, or does away, if you please, with the homestead rights. That intention in most instances, either before or after abandonment, does not control the *fact* of abandonment. Did the head of the family, while living, (man or woman) abandon the homestead, no matter what was the ultimate intention of such head of a family to return—if the homestead was abandoned by the father. he being the head of the family, the homestead right was lost; if abandoned by the widowed mother with a minor child, the homestead was lost as to both, and could not be reclaimed by either.

Homestead is not a fee, it is a right of user, to be lost by non-user or abandonment. Can a person having no interest in the fee, buy the *homestead*, and hold it against a party, who, though claiming through a forced or judicial sale, is still in the eye of the law a purchaser for value, with a recorded title, dating back to the judgments under which he claims, and that were liens long prior to the attempt to make title in this case through Shutt and Starne, the pretended grantors of plaintiff in error.

The Homestead Law was passed to give occupants—heads of families and their minor children—*homes*. It should, as construed by our Illinois Supreme Court, protect the sick woman who temporarily leaves her homestead from physical necessity; it should protect the rights of the little orphan, whose guardian rents its homestead, but it should not, and does not, after creating a "homestead right," put that in the market to be sold as a homestead, when it would seem like the play of Hamlet with Hamlet omitted. Homestead—why this is no home of plaintiff in error—it never was the home of one person through whom he claims.

Where is the fee? Clearly in my client, who has twice maintained such to be the fact. Where is the user? Homestead rights transferred to men who have other homes, who have never occupied these premises as a home? Is there sense in this?

Craddock and his wife say it is not their home and never will be their home. Looking at the facts, the case results in this, there is no right to dispose of a homestead, except by way of transfer to some person having the fee. When the fee has passed voluntarily, or by judicial sale, which is practically the same thing, the homestead claimant may occupy, he cannot sell, he can release to the owner of fee, as a widow can her unassigned dower interest. If the head of the family abandon the homestead, no matter what his intention be, he can do no more. It then becomes a dry question of legal title, the homestead is out of the way. It is a question of title, irrespective of homestead.

Title in fee must rest somewhere, it was clearly in this case in Craddock; it passed from Craddock, by virtue of judicial sales, expiration of redemption rights, and conveyance, to the party through whom the present defendant in error claims, by judicial transfer, long prior to the attempt to buy out a right of user. If this Court sanctions such a transaction, why cannot a debtor in Illinois have, through a judicial sale, his debts paid by such sale, so far as he is concerned, and then transfer his homestead rights, the debtor and his wife ex-

ecuting deeds for the apparent value, and then abandon the premises, as was done in this case, and then sell out the homestead right, which was created by law as a kindness towards the head of a family, and, transfer to a speculator, who had a homestead, the rights of another man and his family. Can the precedent lien creditor be thus ousted by such a conveyance, junior to the lien under which Curran, the defendant in error, claims and is admitted to have paramount title in fee, unless such title is divested by the Homestead Laws of Illinois.

If the present defendant in error had, as was admitted by stipula tion, title in fee to the premises in controversy, how could he be deprived of such title in fee by a third party, who never made these premises his homestead, and whose apparent title was deduced through John Craddock, the common source of title. In brief, the Craddocks prove an unqualified abandonment of the premises in controversy, with no intention on their part of ever thereafter occupying the premises in controversy as a homestead, and that since such abandonment, no person ever has occupied them as a homestead.

It will appear from the record, that it was proved that the east half of lot 5, block 1, E. Roberts' addition to Springfield, Illinois, upon which Craddock's dwelling house was situated, in the year 1858 was worth $3000, and that the west half of said lot, which is now in controversy in this case, was valued at $1000.

An exception seems to have been taken to the ruling of the Court, permitting evidence as to the relative value of each half of said lot 5. If the exception is sustained by this Court as to the proof of such value of each of said halves of said lot 5, how can this Court maintain its jurisdiction in this writ of error, which involves only the west half of said lot 5, which is shown to be worth a thousand dollars, when, by law, that being the subject matter of this writ of error, it should have appeared to have been worth at least $2000, paper book, p. 17. For the purpose of jurisdiction, however, counsel for the present plaintiff in error had the Court below find that the value of the premises in controversy, to-wit: the west half of said lot, exceeded $2000 (paper book, p. 18). Thus, at one moment excepting (p. 17) to the Court's permitting defendant in error to prove that the value of the premises in controversy was $1000, and then (paper book, p. 18) asking the Court to find, as appears from the record, that the premises in controversy were worth $2000, or being in the attitude of a plaintiff in error in this Court having come here without the necessary jurisdictional fact being found of value involved in the controversy sufficient to give this Court jurisdiction, this dilemma, it seems to me, in which counsel for plaintiff in error has become involved, disposes entirely of the exception set out on p. 17, paper book. There is only one other exception taken, that is on p. 18, paper book, and is intended to cover the entire question presented in the case, and involves the points to which I have attempted to direct my argument. The finding of the Court below was on facts. The facts are all found in favor of defendant in error, and maintain the judgment of the Court below.

When, by act of Congress, the practice was adopted of allowing, on written stipulation filed. the Circuit Court to try facts without a jury, then the rulings even of State Courts, where such a practice or custom sanctioned by law had obtained, must be followed. Every

State that has permitted the Court to find facts without a jury being called, when parties waive a jury, has given to the finding of the Court, if general on the issues, or if special under the rules and practices indicated by this Court, the same force and effect that the verdict of a jury would have. The Circuit Court finds a state of facts fully sustaining its judgment, and entitling the defendant in error to have the judgment affirmed. The Supreme Court of Illinois never having definitely, as a "rule of property," settled the Illinois homestead laws and the effect of those laws as to lien creditors, the Court is not bound by local decisions about homesteads, and it is, so far as the Illinois homestead law is concerned, an open question to be decided by this Court for the first time as regards the state of facts and law presented by this record.

I do not propose to take up the time of this Court as to the minor question, whether the west half of lot five was part of the homestead of John Craddock. I take the broad ground that John Craddock, his wife and family, abandoned the right of user, called homestead right, and when they so abandoned, judgment liens attached, sales under judgment liens passed title paramount to every title not prior to the attached lien of a judgment with sale after expiration of redemption and execution of a sheriff's deed that made title. Could an abandoned homestead be transferred to exclude one who by virtue of creditor's rights had a lien, a sale, redemption expired and a sheriff's deed, all relating back prior to attempted transfer of a right of user, a homestead right, the transfer evidently got up to oust for speculation an honest lien creditor with paramount rights. I have disposed, I think, of the frivolous talk on p. 5 of argument for plaintiff in error. The man of straw set up on one page, where defendant in error excepts to proof of value of premises in controversy at $1000, is overturned by his proving as a matter of jurisdiction that the premises in controversy were worth $2000.

If he did not prove that, or if the Court did not find it, or if his exceptions go as they are taken to all the findings of the Court, where has this Court jurisdiction? I want, however, the law of the case decided on the merits of the matter in controversy.

The Supreme Court of the State of Illinois has settled no rule of real property about homesteads. With profound respect for the gentlemen who occupied the bench before the adoption of our recent so called New Constitution, they have never come to any conclusion on the subject of homesteads. The question is open, and if for the protection of citizens of other States, as well as those of Illinois, any conclusion can be found by the Supreme Court of the United States, it will be accepted as the Law of Land, and reconcile the inconsistent decisions of our Court.

I will not take up the time of the Court to review the plausible argument for plaintiff in error that has been furnished me by Hon. B. S. Edwards, of Springfield, Ill., who represented Mr. Black, the defendant below.

The cases referred to are mostly of States other than Illinois; they do not settle her laws of real property. So far as they go, if they have any application, they decide that judgments are liens under statutes, but cannot be enforced until abandonment.

This Court surely will not decide that a homestead encumbered with liens can be held, the lien creditors left unpaid, the debtor occu-

py as long as he pleases, then sell under the heel of the lien, oust that lien, and transfer the entire property to some one who pays him a trifle to procure a clear title to encumbered property by the trick of the homestead law.

Is not the judgment by our statute a lien, provided execution was issued within a year?

That lien is not ousted or merged. Even if there was a setting off of homestead, the fee rests with the owner of the fee, subject to the widow's rights as dowress, and the occupation under the homestead law by the widow and minor children.

The question of abandonment seems scarce worth discussing. The Supreme Court of Illinois have in the cases herein quoted settled that question. There can be no abandonment, actual or constructive, *and* a right left to assert the homestead. Facts may show why a widow temporarily left, why little children rented to a tenant through their guardian and left, but the head of a family can be proved to have abandoned the homestead, when he left his home, and, in point of fact, abandoned it without intending to return, and will not be permitted to prove by way of "mental fencing" that he intended to come back. Why did he not stay at his home.

I now call the Court's attention to what has been decided in Illinois as to effect, of the finding of a Court on facts where a jury is waived. Under the Illinois practice the waiver is made in open court, and entered of record. The act of Congress, requiring a stipulation in writing to be filed, does not vary the effect of the finding of the Court on facts.

A practice similar to the Illinois practice, and analagous to what should be the rule under the act of Congress, has obtained in some of the States besides Illinois. The rulings have always been that the finding of facts on the merits by the Court was to be treated as having the same force as the verdict of a jury. If the Court so holds, the only question to determine is, what construction is to be given to the Homestead Laws of Illinois, on the facts presented in this record.

I cite the following cases, in addition to those already quoted on the subject of Homestead, as touching the effect of the finding of the Circuit Court Southern District Illinois on the facts.

McClintock vs. Rogers, 11 Ill., 300, was a case about the actual location of a township line. It was merely a question of fact. The Circuit Judge found in favor of Rogers. The Supreme Court of Illinois on error, say that the facts as proved sustain the finding of the Court in favor of Rogers, and add "The finding of the Court thus sustained by evidence should not be disturbed."

Again. On the subject of weight to be given to the finding of the Circuit Court on a question of fact, submitted to the Court by stipulation, I refer to the opinion of Mr. Justice Breese in Ambs vs. Honore, 24 Illinois, 122, in which case the learned Judge uses substantially the following language:

"If the facts testified to do not, as they cannot make the same impression upon us as on the court below, they yet are of such a nature as to forbid us from interfering with the verdict."

In the case of Eastman vs. Brown, 32 Ill., p. 57, the Supreme Court of Illinois, Chief Justice Breese delivering the opinion of the Court, says in substance:

"The issues were found for plaintiff, and judgment rendered for plaintiff, the trial being by the Court without a jury. The questions of fact were fraud and want of consideration for a promissory note in litigation in the case."

The Supreme Court of Illinois review facts and affirm judgment of Court below, as if it was rendered upon the verdict of a jury.

If this Court gives the force due to the finding of the Circuit Court of the United States, under the practice inaugurated by the recent act of Congress, which permits trials by the Court without a jury where stipulation is filed, that has been given in the Courts of Illinois and other States, where the law and practice has obtained of allowing in various modes the waiver of a jury and allowing the Court to find facts—then the sole question in the case is the construction by this Court of the Illinois Homestead Laws.

The Supreme Court of Illinois has never definitely settled the question presented in this case as a local law of property,

I submit respectfully the case on the foregoing argument.

JACKSON GRIMSHAW,

Attorney for Defendant in Error.